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**Sacred Sites and International Law:  
A Case Study of the  
Ayodhya Dispute**

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A thesis submitted in partial fulfilment of the  
requirements of Oxford Brookes University for the award of

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## **ABSTRACT**

Sacred sites form a vital component in manifesting the right to freedom of religion. They also function as identity icons for the religious communities in a multi-religious state like India. Protecting them therefore, from aggression, or demolition by states and non-state actors is fundamental to guaranteeing such freedom. The consequences of attacking a sacred site are obvious from the Ayodhya dispute, in which all three organs of the Indian state failed to protect the Babri Masjid from illegal demolition, and to prevent the subsequent nationwide riots. However, the legal failure of the judiciary is quite apparent from the fact that it could not adjudicate an ongoing dispute for more than forty-two years. This protracted delay helped the religious militant groups to transform a local issue into a national dispute which has affected the secular and democratic fabric of contemporary India. This presents a further challenge to the pluralistic nature of Indian society and threatens peace and security in the South Asian region.

The inadequacy of domestic legal mechanisms to settle disputes and provide remedy for violation of human rights warrants intervention at the level of international law. The existing international law provisions, namely, the right to freedom of religion, rights of the minorities, right to property and protection of cultural rights, have failed to include the protection of sacred sites as a right to a religious community. The global human rights mechanisms are mostly monitoring bodies and lack the judicial power. In promoting and protecting human rights, the regional human rights mechanisms, particularly the regional courts, have made use of their ability to deliver binding decisions on member states. The inadequacies in international law are best addressed by a regional convention for the protection of sacred sites, embedded in the existing structures of SAARC.

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## ABBREVIATIONS

ACHR	American Convention on Human Rights
ADHR	American Declaration of the Rights and Duties of Man
AFCHPR	African Charter on Human and Peoples' Rights
AIBMAC	All-India Babri Masjid Action Committee
AIBMCC	All-India Babri Masjid Co-ordination Committee
AIMPLB	All-India Muslim Personal Law Board
<i>AJIL</i>	<i>American Journal of International Law</i>
AU	African Union
<i>AYBIL</i>	<i>Australian Yearbook of International Law</i>
<i>B C Third World L J</i>	<i>Boston College Third World Law Journal</i>
<i>B U Int'l L J</i>	<i>Boston University International Law Journal</i>
<i>Berkeley J Int'l L</i>	<i>Berkeley Journal of International Law</i>
BJP	Bharatiya Janatha Party
<i>Buff Hum Rts L Rev</i>	<i>Buffalo Human Rights Law Review</i>
<i>Case W Res J Int'l L</i>	<i>Case Western Reserve Journal of International Law</i>
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of All forms of Racial Discrimination
<i>Chi J Int'l L</i>	<i>Chicago Journal of International Law</i>
CM	Chief Minister
<i>Colum L Rev</i>	<i>Columbia Law Review</i>
Congress	Congress party of India
CPC	Civil Procedure Code or Code of Civil Procedure
CrPC	Criminal Procedure Code or Code of Criminal Procedure
CSCE	The Conference for Security and Co-operation in Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council

<i>EHRR</i>	<i>European Human Rights Reports</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
ETS	European Treaty Series
EU	European Union
<i>GA JICL</i>	<i>Georgia Journal of International and Comparative Law</i>
GAOR	GAOR – General Assembly Official Records
<i>Hastings Int’l &amp; Comp L R</i>	<i>Hastings International and Comparative Law Review</i>
<i>HRLJ</i>	<i>Human Rights Law Journal</i>
<i>HRQ</i>	<i>Human Rights Quarterly</i>
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia.
<i>IJCL</i>	<i>International Journal of Constitutional Law</i>
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
INC	Indian National Congress
<i>Ind Int’l &amp; Comp LR</i>	<i>Indiana International &amp; Comparative Law Review</i>
<i>Int’l Org</i>	<i>International Organization</i>
IPC	Indian Penal Code
ISS	Islamic Swayamsevak Sangh
IUML	Indian Union Muslim League
<i>IYHR</i>	<i>Israel Year Book on Human Rights</i>
Jana Sangh	Bharatiya Jana Sangh
<i>Just Sys J</i>	<i>Justice System Journal</i>
MLA	Member of Legislative Assembly
<i>MLR</i>	<i>Modern Law Review</i>

MRG	Minority Rights Group
NGO	Non Governmental Organisation
NIC	National Integration Council
<i>Nw J Int'l L &amp; Bus</i>	<i>Northwestern Journal of International Law &amp; Business</i>
<i>NYU J Int'l L &amp; Pol</i>	<i>New York University Journal of International Law and Politics</i>
OAS	Organisation of American States
OASTS	Organisation of American States Treaty Series
OAU	Organisation of African Unity
ODIHR	The Office for Democratic Institutions of Human Rights
OP	Optional Protocol
OSCE	The Organisation for Security and Co-operation in Europe
OAU	Organisation of African Unity
PM	Prime Minister
RSS	Rashtriya Swayamsevak Sangh
SAARC	South Asian Association for Regional Cooperation
SC	Supreme Court of India
<i>Stan Envtl L J</i>	<i>Stanford Environmental Law Journal</i>
<i>Touro Int'l L Rev</i>	<i>Touro International Law Review</i>
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCHR	UNCHR – United Nations Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTS	United Nations Treaty Series
UP	Uttar Pradesh
USA	United States of America
USSR	Union of Soviet Socialist Republics
<i>Vir L Rev</i>	<i>Virginia Law Review</i>

*Vand JTL*

VCLT

VHP

*Vanderbilt Journal of Transnational Law*

Vienna Convention on the Law of Treaties

Vishwa Hindu Parishad

## GLOSSARY

Allahabad	An important city in the state of Uttar Pradesh. It is the seat of the High Court of Uttar Pradesh. A Bench of the High Court of Allahabad has been set up at Lucknow
All India Babri Masjid Action Committee	One of the organisations representing the Muslim interest in the Ramjanmabhumi-babri Masjid dispute.
Ayodhya	City with a population of about 50,000. The birthplace of the Hindu god Ram according to the Ramayana, a Hindu epic. Situated in the state of Uttar Pradesh.
Bajrang Dal	One of the Hindu organisations in the forefront of the movement for constructing a temple at disputed site.
Bhajan and Kirthen	Singing of Hindu devotional songs.
Bharatiya Janata Party	A right wing Hindu nationalist party. It is the ruling party from 1999 till May 2004, and main opposition party from 2004.
Brahmin	A member of the upper caste, particularly priestly caste.
CBI	Central Bureau of Investigation, the premier national investigating agency.
Commissioner	A senior civil administrator of the state government. He/she is in charge of a division comprising 3-5 districts in a state.
Crore	Ten million.
Dalit	'the downtrodden', a self-definition adopted by people of the scheduled caste (lower caste) origin.
Daram Sansad	Gathering of Hindu priests or religious heads.
Darshan	Having a view of deities inside a Hindu temple or holy men/women.
Dharma	Appropriate moral and faith obligations.
District	A territorial unit of civil administration. (Administration of a district comes under the respective state government).

<b>District Magistrate</b>	The head of the civil administration in a district. One of his/her important responsibilities is the maintenance of law and order.
<b>Faizabad</b>	The district in which the town of Ayodhya is situated. The capital of Faizabad district is also known as Faizabad.
<b>Hindu Rashtra</b>	The Hindu nation.
<b>Hindutva</b>	The Hindu Nationalist movement for nationhood and the assertion of 'majority' rule in contemporary India.
<b>Inter State Council</b>	A constitutional body for inquiring into and advising upon disputes between states in the Indian federal set-up.
<b>Janmasthan</b>	Literally 'the birth place'. In Ayodhya, it refers to the locality in which the disputed site is located.
<b>Kar Seva</b>	Means, 'voluntary labour'. Usually in pursuit of a religious objective such as the construction or renovation of a sacred site.
<b>Kar Sevak</b>	One who does the Kar Seva.
<b>Lakh</b>	One hundred thousand.
<b>Lok Sabha</b>	Lower house of the Indian Parliament.
<b>Lucknow</b>	Capital city of the state of Uttar Pradesh.
<b>Mahant</b>	The head of a Hindu monastery or leader of a sect or a chief priest in a Hindu temple.
<b>Mandir</b>	Hindu Temple.
<b>Masjid</b>	Mosque.
<b>Maulvi</b>	A Muslim scholar.
<b>National Integration Council (NIC)</b>	A forum of leading personalities of the country including union ministers, chief ministers of all states, heads of the recognised political parties, prominent members of the parliament. Its membership presently numbers about 150.
<b>Nawab</b>	A vice-regent, equal to Viceroy in British India.
<b>Nazul</b>	A piece of land used only with the permission of the government.
<b>Pandit</b>	A learned Hindu Brahmin. (Brahmin is a member from upper caste).



<b>Puja</b>	Offering worship to deities according to Hindu practices.
<b>Puja</b>	The act of worship.
<b>Rajya Sabha</b>	Upper house of the Indian Parliament.
<b>Ram</b>	Also called Rama, Shri Rama, Bhagavan Shri Ram, Ramachandra. According to Hindus, Ram was an incarnation of the god 'VISHNU'. He is worshipped as a human manifestation of God embodying the virtues of a noble human being and an ideal king.
<b>Ram Chaputra</b>	Literally 'The platform of Ram'. A rectangular platform which existed in the outer courtyard of the disputed structure.
<b>Ram Janmabhoomi or Ramjanmabhumi</b>	The name given to the disputed area in Ayodhya. Literally 'Ram's birth place'.
<b>Rastriya Swayam Sevak</b>	An extreme right Hindu organisation. Literally means 'National Volunteer Organisation'.
<b>Rath Yatra</b>	Literally 'a chariot journey'. Name given by Indian politicians to journeys undertaken for mass contact and creating public opinion. The journey is undertaken in a vehicle called a 'Rath' (chariot).
<b>Sadhu</b>	A Hindu monk, wanderer.
<b>Sakthi</b>	A Hindu goddess worshipped all over India.
<b>Sangh Parivar</b>	'the Sangh family', a term used to refer to a number of RSS-associated Hindu nationalist organisations.
<b>Shilanyas</b>	Laying of the foundation stone to a building. Normally it is a religious ritual.
<b>Tirtha</b>	A place of pilgrimage.
<b>Uttar Pradesh</b>	The most populous state of northern India where Ayodhya is situated.
<b>Vaishnavite</b>	A devotee of the Hindu god Vishnu.
<b>Vishwa Hindu Parishad</b>	Literally 'World Hindu Council'. It is the leading organization in the Ram temple construction movement guided by the RSS.
<b>Waqf</b>	The dedication by a Muslim of any property for any pious, religious or charitable purpose.

# **CHAPTER 1**

## **INTRODUCTION**

This study has its moorings in the actual socio-political context of the Indian sub-continent, and carefully examines and analyses issues of human rights most particularly pertaining to the freedom of religion and the protection of sacred sites.

The introductory chapter of this thesis outlines the central research argument, objectives envisaged, methodology adopted, research questions applied, chapter outline, significance and limitations of the study.

### **1.1. My thesis**

It has now been established in many human rights treaties which exist internationally and regionally, that the right to freedom of religion is a human right and as such it requires all states in the international forum to ensure the peaceful enjoyment of that right for all its citizens. Consequently, this legal study analyses the scope of international human rights law in protecting sacred sites, which is an important component of the right to freedom of religion.

The right to freedom of religion covers a variety of rights. Significant, not least because it is contested, is the right to worship individually or/and as a community. Collective worship plays a pivotal role in expressing one's faith or belief. As a result, places or objects of worship, including temples, mosques and churches are gradually raised to iconic status. They become the focus of respect and veneration. Some of them even draw pilgrims. Devotees too place their trust in such objects and receive consolation, comfort and strength from them. Popular piety almost grants divine sanction to these objects and buildings. Selected sites and objects are thus considered sacred by almost all the religions because of the devotion they perpetuate.

Most of the religions, during the course of their history, have established sacred sites for their adherents to conduct worship or go to on a pilgrimage. Any number of examples can be cited from the beginning of recorded human history. However, sacred sites as visible symbols of a particular religious group or a specific belief system also remained vulnerable to attacks from intolerant states, co-religionists and non-state actors.

Aggression of any kind on any of the sacred sites belonging to any religion amounted to gross human rights violations, not only because of the sacredness attached, but because of the identity and security it offered to a community. Hence, the right to protection of sacred sites, necessarily, includes other fundamental human rights such as minority rights, right to life, right to peaceful assembly, and right to freedom of thought and expression.

Although the United Nations was established to protect the future world from the scourge of war and human rights abuses, its record in protecting the fundamental religious rights, especially the collective right to worship, does not match with other individual human rights mentioned in the Universal Declaration of Human Rights (UDHR).<sup>1</sup> The turn of the twenty-first century has witnessed a number of attacks on sacred sites which deny the fundamental right of the people to hold fast, practice and live up to their faith. Besides, the rise of various extremist religious groups threaten not only religious freedom but also social pluralism and religious tolerance in many societies, hence demanding that the international community contemplate the establishment of radically new mechanisms based on new international legal provisions.

To engage with these vital issues affecting any worshipping community, the Babri Masjid-Ram Temple dispute in Ayodhya, in the state of Uttar Pradesh (UP) in India, is explored. Ayodhya, by all historical accounts a sacred site of the Muslims, became the target of attack by a section of a Hindu revival group. Naturally, two major religious communities were drawn into the dispute. What began historically as a property title dispute between two localised groups, later emerged as a dispute concerning a sacred site. Interestingly, Ayodhya became the symbol around which Hindu religious militant groups, supposedly

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<sup>1</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

belonging to the majority religious community, seemed to have built their identity to gain political power.

The central argument of the study comprehensively delves into the legal tangle hold of the Ayodhya issue. What prompted the student to research this particular issue is the prolonged period of time required to settle an issue that began as a property title dispute, but was subject to such a delay that it took an unprecedented toll on human rights.

For more than forty-three years, the dispute could not find a legal settlement either from the lower or the higher courts in the country. The inadequacy of the prevailing Indian legal system was hence exposed in the demolition of the Babri Masjid on 6 January 1992, and the unprecedented violence that followed throughout the country. The demolition had effect beyond the territory of India and resulted in the demolition of temples and mosques in other countries in the region. This shows that dispute around a particular sacred site today has implications beyond the boundaries of any one state and can acquire international character.

Moreover, the central argument of the thesis lies also in ensuring effective remedies to these disputes from international human rights law. The role of an international legal instrument has become imperative in today's context for settling sacred site disputes. Therefore, this thesis analyses the need to construct new international human rights legal provisions for safeguarding sacred sites. This will be based on the understanding that a regional convention on protection of sacred sites is within the purview of the provisions of the international human rights law. Hence, the proposed regional model convention, which this research outlines, bridges the gap existing between the internal and international legal systems. The model convention, as a result, would also become legally resourceful in formulating and developing international human rights law to protect sacred sites.

## **1.2. Scope of the study**

This section explains the key choices as to the substance of the thesis. Explanation of the choices is also helpful for understanding the key terms used. The study emphasises how timely and relevant it is, specifically for India.

As the title, “Sacred Sites and International Law: A Case Study of the Ayodhya Dispute”, indicates, sacred sites and their protection form the nucleus of this research. Whenever sacred sites come under attack and the domestic judiciary fails to deliver justice in protecting such sites, the need for looking at international human rights law for an effective remedy is raised. Hence, a case study on the Ayodhya dispute explores the need for the creation of an international instrument to bring such remedy under international human rights law.

Sacred sites are significant identity icons of any religious community. The right to freedom of religion includes the right to worship individually and/or in communion with others to exercise one’s faith in a supernatural being or beings. In a pluralistic, specifically multi-religious society, sacred sites have not only religious, but also socio-cultural significance. They become cultural as well as religious centres. Moreover, during disputes among various communities, sacred sites may be used for political mobilisation by the ethnic communities. To assert the existence and identity of a religious group, the members of these groups may struggle to protect such symbols at any cost. Wherever sacred sites are in dispute between a majority and a minority community, it may lead to massive human rights violations in a state. Precisely, this is what has happened in the case of Ayodhya. A section of a majority Hindu community had demolished the sacred site of the minority Muslim community.

Moreover, sacred site disputes may have the potential to divide a civil society along religious lines which may affect the stability and rule of law in a state. In addition, since religious communities exist trans-boundary, any attack on their sacred site in one state, inevitably causes tension and sometimes violence in other states where such religious communities are present. This spill over effect of a religious dispute may affect peace and stability regionally and internationally. It might be taken into account, however, that the power of any sacred site dispute to divide a society along socio-cultural and political lines leaves deep hatred among the concerned communities, especially when such disputes are manipulated to gain political power or to achieve personal gains. Hence, this research

focuses on safeguarding all sacred sites as part of protecting and promoting right to freedom of religion and other fundamental human rights. The Ayodhya dispute vividly illustrates the significance of disputes over sacred sites, particularly how such disputes lead to considerable human rights violations.

Ayodhya is a small town in the state of Uttar Pradesh (UP) in North India. According to the Hindu epic, Ramayana, Ayodhya is defined as the birthplace of the Hindu god, Ram. Since at least 1528, Muslims have been using the site as a mosque and conducting worship there. As early as 1885, conflicts between Muslims and Hindu communities about the use of the site entered the legal forum. The modern dispute dates back to the very beginning of the independent Indian state. In December 1949, the idols of Ram and Sita (Ram's wife) were placed inside the Babri Masjid, by a few members of the Hindu community. Instead of removing the idols at once and restoring the property to the Muslim community, the court through an order of interim injunction, locked the mosque denying the Muslims their right to worship. Subsequently, many suits were filed before the court from 1950. From the early 1990's the Babri Masjid dispute had become the key theme around which public discourse operated. In 1986, the Faizabad court allowed Hindus to conduct their worship of their idols by opening the gates of the mosque while prohibiting the Muslims to enter the site. Subsequently, the dispute led to several communal riots resulting in egregious human rights violations. On 6 December 1992, the four hundred and fifty year old mosque was demolished by the Hindu militant forces. This led to the unprecedented violence and riots throughout India which claimed more than two thousand lives. Fifteen years following the demolition, the civil suits filed in 1950 and the criminal litigation against the perpetrators of the demolition of the mosque are still pending. The Ayodhya dispute remains a trigger point for major riots and pogroms. For example, in February 2002, in the state of Gujarat, more than two thousand Muslims were killed within three days in response to the killing of fifty-five Ram devotees returning from Ayodhya.

The Ayodhya dispute, which began in 1950, remains still a central issue in Indian polity. It has intensified the growth of religious militant forces from the 1980's which has affected the democratic values and rule of law in the country. The civil society has been divided

along communal lines and the rights of minorities are under severe strain. The communalism of the majority has helped to construct minority communal forces affecting the secular nature of the country. It may be argued that the communalisation of politics has influenced the judiciary and other state organs in India.

Moreover, the Ayodhya dispute has created tension in neighbouring countries, and led to attacks on lives and sacred sites of the minority Hindu population in Pakistan and Bangladesh. The religious disputes based on sacred sites, and attacks on the members of the minority community remain a cause of concern in South Asia, particularly between the two nuclear powers of India and Pakistan. Since the Ayodhya dispute has changed the socio-cultural and political nature of India, it has been chosen as a case study.

As seen above, any religious dispute has the potential to affect bilateral and multilateral relations between other countries. The trans-border spill over effect has been reported in several cases such as the Ayodhya dispute. Hindu-Muslim relationships in India have important implications for the future peace and security of South Asia. This concern emerges from the fact that India is strategically important within the South Asian region and any internal disputes have potential repercussions for all the subcontinent's minorities. The globalisation process has caused the migration from the subcontinent and Indian heritage religious communities exist throughout the world following everything that is happening in their home country. This shows that religious disputes in India have serious international repercussions.

Every domestic judiciary has an important role in protecting the fundamental rights of citizens as guaranteed by the law of the land. By upholding the sanctity of constitutional rights, the judiciary assists other organs of the state in maintaining rule of law, public order, and peace in a given state. The failure or ineffectiveness of judiciary in adjudication of disputes may result in anarchy and violation of fundamental rights. Moreover, when the judiciary displays a biased attitude in favour of the majority community, it leads to the denial of the rights of minority communities to exercise their fundamental human rights. In the Ayodhya dispute, the Indian judiciary could not provide justice for the Muslim minority

community and religious bias of the judiciary was apparent which led to violence and riots and subsequent demolition of an ancient sacred site.

The failure of the domestic judiciary to protect the religious rights of the people, particularly the minority communities, questions the role of international human rights law in protecting the fundamental rights of people in those countries where the judiciary has failed to provide adequate justice. Precisely, this becomes the focal point for the research to examine the protection offered by international human rights law in protecting sacred sites as part of fundamental right to freedom of religion.

As the research advanced, the analysis of international human rights law and enforcement mechanisms revealed the gap in providing adequate remedy in disputes similar to the Ayodhya dispute. This void is filled by proposing a regional human rights convention for the South Asian region where religious disputes lead to massive human rights violations. Regional human rights systems operate under international human rights law and they have proved to have a greater efficiency in achieving the aim of protecting and promoting international human rights. Regional systems are not only inter-connected with each other but also with the large global system of which they are components.<sup>2</sup> International human rights law has been developed through the growing jurisprudence and evolution of regional human rights systems,<sup>3</sup> wherein the various systems reinforce international norms while responding to the particular problems of each region. The binding judicial decisions of human rights courts in the region create more obligations on the member states than an international mechanism such as the Human Rights Committee. Based on these reasons, a regional human rights convention on protection of sacred sites is proposed for South Asia. It would be fitting to point out at this juncture that this proposal is a significant development of the research and it has sharpened the focus of the study.

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<sup>2</sup> See, D Shelton, 'The Promise of Regional Human Rights System' in BH Weston and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 351- 98.

<sup>3</sup> For instance, the ECHR, although a regional instrument, has had an impact upon the development of norms in general international law. J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 138.



### **1.3. Objectives**

The objectives envisaged by the research are enumerated as follows:

1. To examine the possibility for a domestic legal settlement to resolve the Ayodhya dispute amicably, restoring harmony at the national level and peace in the region?
2. To examine the failure of the judiciary in protecting a significant sacred site belonging to a minority community;
3. To evaluate the prevailing international law and institutions dealing with such disputes over sacred sites; and
4. To propose necessary reforms to international laws, particularly proposing a regional convention for bringing redress of disputes over sacred sites.

### **1.4. Research Questions**

To further the objectives of the study, the following research questions were applied.

1. Given the significance of a sacred site for the identity of a religious community in the multi-religious context of India, is there a possibility still for a legal settlement and will a legal settlement end the dispute amicably, restoring peace in the region and harmony at the national level?
2. Since the dispute at Ayodhya has affected the contemporary polity of the Indian state, what significant changes has the dispute brought to the secular, democratic and social fabric of India?

3. According to the rights granted in the constitution, has the Indian judiciary taken necessary steps to protect the rights of a minority community in relation to the Ayodhya dispute? Is the delay in any way linked to the political process prevailing in the country, then and now? Does the Indian legal system contain enough provisions to arrest the rise of militant religious organisations which polarise civil society and incite violence?
4. At the wake of failure from the domestic courts, can an international or regional legal mechanism step in to settle the disputes and mete out justice to the affected party?
5. Can the Ayodhya dispute be a test case for formulating a regional convention that would be powerful enough to redress the disputes regarding the sacred sites of the region and set a model for settling similar disputes in other regions?

Although answers to these research questions are woven within the text of the thesis, chapter 6 directly addresses these questions while dealing with the case study on the Ayodhya dispute.

## **1.5. Methodology**

This section illustrates the methodology adopted to answer the above research questions. Keeping in line with the objectives proposed, the study uses doctrinal legal methodology to analyse Indian legislations and case law as well as international law. This methodology consists primarily of analysis of documentary sources which are available in the public domain. The principal documentary sources used for this study consist of published legislations, court judgements, international legal documents, treaties and decisions of international and regional human rights institutions. The secondary sources include legal texts, published books, archival and academic resource materials. A common approach to

documentary analysis is content analysis, the quantitative analysis of what is in the document.<sup>4</sup>

The primary and secondary documentary sources are collected from the Bodleian Law library and the British library. In addition, basic legal sources, books and journals are collected from Oxford Brookes University. The sources related to the case study are collected from the Indian Institute library, Oxford, and the Islamic Studies library in Oxford. In addition, during a fieldwork trip to India, libraries in Delhi, Chennai and the Centre for Study of Society and Secularism, Mumbai were used. Many other sources are collected through inter-library loan from various other universities. Some of the international sources are drawn from the headquarters of UNESCO.

The data is analysed using the quasi-judicial approach which combines features of judicial procedure and scientific method as a way of solving professional problems raised by the occurrence of actions and circumstances.<sup>5</sup> It attempts to apply rigorous reasoning in the interpretation of empirical evidence collected systematically from the documents. The quasi-judicial method is used as an attempt to improve the scientific quality of studies of individual cases.

This research is based on a case study method which is a well-established research strategy. Social scientists have widely used this qualitative research method to examine contemporary real-life situations. Case study facilitates an understanding of a complex issue and adds strength to what is already known through previous research. It focuses on a case and takes its context into account. Yin defines a case study in the following terms:

Case study is a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real life context using multiple sources of evidence.

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<sup>4</sup> Content analysis is a research technique for making replicable and valid inference from data to their context. K Krippendorff, *Content Analysis: An Introduction to its Methodology* (Sage, Newbury Park, California 1980) 21.

<sup>5</sup> For details, see, DB Bromley, *The Case-Study Method in Psychology and Related Disciplines* (John Wiley & Sons, New York 1986)

One of the advantages of case study is that it involves multiple methods of data gathering. Fieldwork was also carried out to supplement the analysis of the documentary materials. To conduct the fieldwork, a three month trip was undertaken in 2005-2006 and the places visited include Delhi, Chennai, Mumbai, Lucknow and Ayodhya. Twenty semi-structured interviews and numerous oral testimonies in the form of personal dialogue and group discussions were conducted. The names and professions of the interviewees are given at the appendices 1 and 2.

The locations covered rural villages in Uttar Pradesh, urban areas in Mumbai, Delhi and Chennai and research institutions in these places. The choice of interviewees included lawyers who conducted the cases relating to the dispute in the High Court in Lucknow and the Supreme Court in Delhi, renowned secular historians, and human rights activists like Asghar Ali Engineer and Ram Puniyani. These persons were chosen as they were directly involved in the Ayodhya dispute.

Due to lack of personal contact in North India, access to these persons was obtained through human rights agencies working in those areas. Many of them were contacted through mail and phone calls and some of them failed to reply. Access to some of the interviewees had to be gained through teachers, staff in minority institutions, who acted as interpreters and also accompanied the visit to Ayodhya.

The majority of the interviewees willingly expressed their consent to use their names. The interviews were semi-structured and were formal. Some of the interviews were informal during the group discussions. Often the background of the researcher was asked with suspicion and it was a struggle to prove the secular credential of the scholar. Some of the leaders from religious militant organisations were not willing to share their opinions because the student is a member of a Christian community and a priest. However, group discussion with human rights activists and academics sharpened the focus for the study and added strength to the proposed convention. Apart from the interviews, keen observation was used as a supplementary method to collect sufficient data. This complemented and helped to validate the information collected from the interviews.

It must be added that the personal visit undertaken to Ayodhya during the fieldwork, further enhanced any knowledge regarding the actual situation at the disputed site. Though the members of the Hindu militant groups had an aversion to the Muslims, the common feeling among both communities was interestingly cordial, both parties expressing a wish for an amicable and speedy legal settlement.

Further fieldwork was conducted in 2007, when group discussions were held in five places in Tamil Nadu, India, details of which are included in Appendix 2.

## **1.6. Contribution of the research**

### **1.6.1. Legal review of the dispute**

The Ayodhya dispute has been approached from many perspectives such as social, cultural, and economic failures in the country. Although these perspectives may be important to understand the case study, the approach of this thesis, the first one of its kind,<sup>6</sup> is to review the complexities of the dispute from the legal perspective.

### **1.6.2. Pointing out the failure of the legal system**

For the Indian legal system, the research, as a detailed case study, points out the failure of the courts in protecting the religious rights of the Muslim minority community. By delaying to deliver justice in a property dispute between a few people from the Hindu and Muslim communities, the courts allowed a local dispute to become a national issue around which whole political discourse was built for the last two decades.

The case study has revealed that to protect democratic values, particularly secular values, and rule of law in the country, the courts have to pay utmost attention to settling the dispute

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<sup>6</sup> This research is the first one of its kind which studies the Ayodhya dispute from a legal perspective, although Stacey D Burlet has researched on Hindu-Muslim relations in India from 1977-1993, the period which is crucial to the Ayodhya dispute, for the purpose of understanding ethnic conflict. This is a Peace Research and sociological study. Stacey D Burlet, 'Challenging Ethnic Conflict: Hindu-Muslim Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997).

at their earliest. So, the research has highlighted the inadequacy of the courts and the need for the judiciary to be independent and unbiased to be effective organs of a state.

### **1.6.3. Responsibility of the international legal institutions**

In the context of international human rights law, the research has brought out the existing international human rights law and mechanisms that are insufficient to protect sacred sites when a dispute arises. When such disputes lead to massive human rights violations, the international reaction remains inadequate. As such, the rights of the individuals are upheld at the international level, but not the collective rights of a religious community. The research, therefore, establishes the gap existing between the individual right to freedom of religion and collective right to protection of sacred sites.

### **1.6.4. Need for regional convention**

In protecting and promoting human rights, the regional human rights mechanisms seem to have more effect than the international mechanisms. The existence of various regional human rights courts created by regional human rights conventions adjudicate disputes and deliver judgements with binding obligations among member states. However, such a regional human rights treaty or human rights court does not exist in the South Asian region where human rights violations based on religious disputes are egregious. This research proposes a regional human rights convention among the SAARC (South Asian Association for Regional Co-operation) countries, to protect sacred sites as protection of fundamental right to freedom of religion and other human rights.

This convention, if adopted and carried out in good faith, will assist in restraining growing militancy among various religions in South Asia. The proposed regional human rights court will be a mechanism which may be used to deliver a speedy justice in an impartial manner. These regional human rights instruments may pave the way to the creation of a fully-pledged treaty covering various fundamental human rights and the proposed court may

become an important instrument in protecting and promoting human rights under international law.

A model regional convention as proposed by the thesis stands as an important contribution around which the entire research revolves.

### **1.6.5. Shrinking secular space**

From the 1980s the Ayodhya dispute took centre-stage in Indian politics and a phase of communalisation of the civil society has begun. One of the reasons is that the Indian National Congress party, with secular credentials, started overtly adopting religious favouritism in favour of the majority Hindu religion and also appeasing the religious minorities. In this process, Congress also used religious symbols. Additionally, the left-oriented political parties also failed to occupy the secular space. A vacuum was created. Simultaneously, the growing social unrest due to increasing poverty, unemployment, and illiteracy further widened the vacuum. This space was used by the militant religious organisations. Ayodhya became a useful tool for their nefarious activities. Hence, this research can shed new light on the predicaments secularism in India faces today and can provide legal means to redress the onslaught.

### **1.6.6. Communalisation of civil society**

The recent religious revivalism across the globe has brought religion once again to the centre stage in many societies. Factors such as poverty, marginalisation and ethnic disputes have also intensified the resurgence of religious extremism leading to violation of human rights in recent decades. Hence, sacred sites have become the target of attack by various conflicting communities,<sup>7</sup> especially in a multi-religious state like India.

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<sup>7</sup> For instance, the claim 'religion as a cultural phenomenon continues to manifest as a force for social and political conflict, violence and repression', by Liam Gearon, 'General Introduction' in Liam Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 5.

Similarly, unfounded suspicion and consideration of other communities as enemies are the primary cause for any crisis in the nation, and nefarious tactics follow to alienate one another from the mainstream of civil society. This has polarised the Indian society on communal lines and threatens social cohesion and religious harmony.

Though the focus of the study mainly hinges from a legal perspective, efforts taken to view the dispute from a wider perspective of communalisation and the proposal to build up the secular civil society for the implementation of the proposed model convention is another contribution the study makes.

#### **1.6.7. Research from the field for the field**

Moreover, this academic search emerges from the concern of the researcher as a human rights lawyer and as a member of the religious personnel of a minority religious community, interested in protecting and promoting human rights in India and in South Asia.

The entire process of the research is an outcome of the confidence the scholar has placed in the legal norms and systems at national and international levels in protecting the rights of the people within a particular state boundary.

The personal concern, interest and commitment of the researcher raise the study to a life-long search rather than to limit itself to mere academic exercise. It may be rightly viewed as an ongoing human rights exercise which will be useful in bringing justice to the poor victims of the communal riots in India and in other parts of the world.

The scholar has seen with his own eyes the plight of the victims of communal frenzy. Those who suffer at the height of a dispute that spills over into violations of human rights, are the poor, those who live at the hem of society, and the vulnerable sections, especially women, children, Dalits (members of lower castes) and the Tribals. As a person privileged to have known the legal system and its tangles in India, the scholar sees this research as a



step forward in clarifying the priorities and deepening the commitment for human right issues.

The realisation in the course of the research trips that the proposed convention can only be collectively realised and that too not from above as an institutional system but from the grassroots by networking with committed persons, groups and movements, is yet another vital point that the research underlines.

### **1.7. Reservations on the research findings**

In spite of the significance and the contribution that the research tries to make, at the close of this legal search, the researcher found the following reservations. Although they do not undermine the quality of the research, they actually open up further vistas of the academic search undertaken. They are enumerated as follows:

#### **1.7.1. Need for a wider legal outlook**

Very rightly, the study is preoccupied with the legal system operating in India. It aimed to reveal how the legal system in India has failed to mete out justice to a minority community by unduly prolonging a dispute relating to one of their sacred sites. A critical look at the background of the legal tangle would indicate how the present state of affairs is linked to several factors at work. Definitely, the research has pointed out some of them, like growing economic disparity, communalisation of Indian polity, the shrinking of the secular space, and so on. However, as the study has limited itself to legal implications, a much wider outlook on the realities operating in India would have placed the research in a broader perspective. As it only points at the failure of the legal system, it lacks the critical analysis of the impacts of socio-political spheres on the judiciary.

Obviously, fundamental human rights are linked to livelihood issues. Unless a legal or political system addresses itself to such vital issues affecting people living at the lower hem of affairs, no legal tangle hold can be settled, especially the one this research undertakes, as the victims involved are mostly living below the poverty line. Above anything else, what

needs to be tackled is the youth, particularly belonging to the middle class, who are so willing to rally around the communal forces, who are working overtime to impede legal procedures.

### **1.7.2. An ambitious proposal**

Secondly, the proposed regional convention looks like a fond and distant dream, a vision, whose actualisation still remains to be seen. It revolves around a vital question involving bilateral relations between at least two major political powers in South Asia, viz., India and Pakistan. However, recent developments among SAARC countries instil hope that human rights considerations are given importance in their mutual relations. Besides, there are a number of human rights organisations already operating on a South Asian level, which give the hope that such a dream is possible and quite necessary for building up the region, free from religious discord.

### **1.7.3. Considering democratic forms of Government**

The model convention also takes into consideration the existence of democratic forms of government in the region. Although in reality all the SAARC countries are not fully democratic, there are already signs that they would all aspire to be so because of the happenings within and the political compulsions from outside, especially South Asian Free Trade Area (SAFTA) that envisages democratic forms of governments. The proposed Buddhist pilgrim route, university, and the rail link between the regions among SAARC member states is sure to strengthen democratic set up and bilateral relations. The Ayodhya dispute certainly has affected relations with the neighbouring states and their minority religious communities. Their sacred sites too came under attack. Hence, a peaceful zone founded on democratic principles is not a far- fetched dream. If there is a political will, which the proposed convention envisages, stable democratic forms of governance will be established.

## **1.8. Overview of the thesis**

The findings of this research are presented in six chapters. They are enumerated as follows:

1. Introduction
2. Research context
3. Case study of Ayodhya dispute
4. Sacred sites and international law
5. Proposed regional convention
6. Conclusion

### **1.8.1. Introductory chapter**

As seen, the introductory chapter has briefly outlined the significance of the study, objectives, research questions, case study as its methodology, salient contributions it makes and the limitations. The structural presentation of the thesis introduces to the main content, major arguments or the findings.

### **1.8.2. Research Context**

Chapter 2, entitled, ‘The Research Context’, delineates the context to understand the case study chapter that follows in Chapter 3. This examines the three organs of the Indian state, namely, the Parliament, the Executive and the Judiciary, their structure and functions as defined in the Indian constitution. These institutions have the responsibility to protect and promote human rights in the country when they are violated by state, non-state actors and other individuals.

It also examines the characteristics of Hinduism and Islam, two important religions involved in the case-study. This is necessary to understand the case study, predicated upon the decision that it is not possible to properly understand the application of law to a

particular religion without first being able to reflect upon what that religion is. How sacred sites are constructed in these religions and why they are important in expressing their faith are evaluated in its context to explain why the sacred site dispute has become a national issue affecting the plural nature of the Indian society.

The growth of militant religious organisations is covered briefly to highlight the fact that a sacred site dispute is not only a religious issue but also part of wider socio-political issues. Although the Ayodhya dispute is basically a religious dispute, it was later used by the militant organisations to establish their dominance in Indian polity.

Chapter 2 is concluded with a discussion of broader intellectual themes, such as an analysis of sacred sites with a working definition and understanding of conflicts between different religious groups in India.

### **1.8.3. Case study**

The dispute between Hindus and Muslims over a sacred site in Ayodhya is illustrated in Chapter 3. This chapter gives a brief overview of the dispute to explain its historical background. A short history of the site covers a period from 1528 until 2007. Subsection 2 of the same chapter covers various litigations relating to the site from 1885 until 2007. In pre-independent India, the suits were filed to build a small temple over a *Chaputra* which some Hindus claimed was the birthplace of Ram. This Chaputra remained outside the Babri Masjid compound wall. The suits were dismissed and it was established that the petitioner did not have the right to property. In independent India, the dispute assumed a new phase with the placing of the idols of Ram and Sita by a few Hindus inside the mosque. The title dispute to the site started in 1950 through various court cases and the cases remain in the courts without any final adjudication. These cases are examined in detail and the failure of the courts in this dispute has been established.

The third chapter also highlights the failure of the courts through judicial delays, prevarication, avoidance and complicity. Although it failed to deliver a final judgment, the

court, through interim injunctions, asked the parties to maintain status quo. Even this minimal 'status quo' order was not enforced by the state executive body when the Hindu militant party Bharatiya Janata Party (BJP) came to power in the state of UP which led to the demolition of the sacred site, belonging to the minority Muslim community. The obvious failure of the executive became apparent when riots broke out during the post-demolition period and then there may not be any precedent in independent India with regard to the loss of lives and damage to the properties including sacred sites belonging to minority communities.

Illustration of the case study also revealed the failure of the union government to take a firm action when the state government failed to check the militant forces from demolishing the sacred site. Although the Indian constitution empowers the union government to take necessary action when the state government fails to maintain public order and protect the fundamental rights of people who live within the state, the union government chose not to act until the militant forces achieved their aim of demolition of the sacred site, and built a make-shift temple on the site where the destroyed mosque had stood for more than four centuries.

Finally, this chapter also describes the failure of the courts in punishing the persons responsible for the demolition, although the demolition took place in 1992. In protecting and promoting human rights, particularly rights of minorities, the courts have not acted in an impartial manner. By delaying the delivery of justice for more than four decades, the judiciary seem to have exhibited its majority religious bias, and this may affect the lives of minorities in a pluralistic society. Moreover, by failing to give a final verdict on the dispute in a reasonable time, the courts have undeniably contributed to the intensive campaign of the *Sangh parivar* in magnifying a local dispute into a national issue. The riots and violence from 1984, when Vishwa Hindu Parishad (VHP) came to the scene, have claimed more than a few thousands and divided the Indian civil society along communal lines.

#### **1.8.4. Sacred sites and international law**

Chapter four examines the existing international human rights law provisions in protecting sacred sites. As an essential component of the right to religious freedom, sacred sites need to be protected from attacks as well as from limiting a religious community, through various methods, to enter into and exercise their faith through worship at the site. This chapter approaches protection of sacred sites from four areas which are set out in the international treaties and declarations. The areas include right to freedom of religion, minority rights, property rights and cultural rights. Protection of sacred sites could be covered under these rights. However, in-depth analysis has exposed the inadequacy of existing international human rights law to protect sacred sites.

#### **1.8.5. Proposed regional convention**

Chapter five evaluates the existing regional human rights mechanisms in Africa, inter-Americas and in Europe. Compared to the international mechanisms, the regional human rights mechanisms could be more effective, as highlighted by Europe. Based on these findings, the fifth chapter proceeds to propose a regional human rights convention for South Asia. For this, the nature of South Asian countries is examined and the regional organisation, South Asian Association for Regional Co-operation (SAARC) is evaluated. Although there exist religious differences galore in South Asian bilateral relations, particularly between the two major powers of India and Pakistan, the recent developments in building up a strong relationship among SAARC nations supports the argument that a convention for protection of sacred sites will facilitate the protection and promotion of human rights in this region.

#### **1.8.6. Conclusion**

The final chapter brings the thesis to a conclusion. This summarises the key themes, and assesses the contribution to the Indian legal system and international human rights law. The

conclusion also opens new avenues for further research on the topic, both from legal as well as from related dimensions.

The above structural presentation of the thesis is arranged in a way to cogently present the underpinnings of the research. After the introductory chapter, the research context sets out the various contexts for a better understanding of the case study. Familiarity with Hinduism and Islam in India, and their construction and understanding of sacred sites, enables recognition of why two communities are ready to attack and kill each other and continue conflicts for a sacred site. Presentation of the demography of Hindus and Muslims and the majority-minority struggles are vital to realise the significance of the Ayodhya dispute. The nuances of caste system, dominance of upper castes, construction of a 'syndicate Hinduism', are some of the characteristics of modern-day Hinduism.

Equally important is to understand the power and role of the judiciary in the Indian political system for the case analysis. The judiciary has failed to fulfil the aspirations of many marginalised, poor and minority communities. Its religious bias has been quite prominent. Communalisation of the state organs, and hence their loss of credibility to be impartial to protect and promote the rights of the common people in the civil society, go well with the deeper analysis of the case.

After the presentation of the research context, the case study follows. It illustrates the failure of the judiciary, and other organs of the state, to bring a remedy to a disputed sacred site and protect people from communal riots and human rights violations. The regional and international reaction to the destruction of a sacred site, and the subsequent riots, are presented to review the capacity of the international human rights mechanisms to protect sacred sites under the protection of right to freedom of religion and protection of religious minorities.

The chapter assessing the existing international human rights law reveals the inadequacy of existing mechanisms to protect sacred sites. However, the analysis of the regional human rights mechanisms highlights the fact that these are more effective with their adjudicatory

mechanisms, namely, regional human rights commissions and human rights courts. Hence a proposal for a regional model convention on protection of sacred sites is made in Chapter 5.

The ensuing chapter will present the research context, examining the three organs of Indian state, namely, the Parliament, the Executive and the Judiciary. It also examines the characteristics of Hinduism and Islam, two important religions involved in the case-study. How sacred sites are constructed in these religions and why they are important in expressing their faith are evaluated. The growth of militant religious organisations is covered to highlight that a sacred site dispute is not only a religious issue but also forms part of the wider socio-political context. It will be concluded with a working definition and understanding of conflicts between two major religious groups, Hindus and Muslims, in India.



## CHAPTER 2

### THE RESEARCH CONTEXT

#### 2.1. Introduction

The research context systematically presents the literature available on the central arguments of the study. As pointed out at the end of the previous chapter, a methodical presentation of the resource material enables clarification of the research context, viz., the sacred site dispute at Ayodhya. Outlining of the legal as well as historical, primary and secondary documentary sources definitely enhances the understanding of the case in point, the international legal instruments on sacred site disputes, the involvement of the Indian legal system for settling the dispute, historical background of the religious groups directly engaged in the dispute and the model convention proposed.

Structurally, this chapter on the research context has four main sections. It starts with the scientific definition of the sacred site in the first section. The second section reviews the international legal instruments available to settle sacred site disputes. What follows in the third section is a brief exposé of the judicial system operating in India. The final section explains the religious groups involved in the dispute, viz., Hinduism and Islam. It must be noted here that this presentation only details the aspects of Hinduism and Islam that are essential to situate the importance of the sacred site in both the religious traditions.

#### 2.2. Definition of sacred space, place and site

The word 'sacred' stems from the Latin word *sacer*, which means 'to make holy'.<sup>1</sup> In essence, 'that which is set apart from the ordinary world'.<sup>2</sup> According to Tuan, the true meaning of 'sacred' goes beyond stereotypical images of temples and shrines, because at the level of experience, sacred phenomena are those that stand out from the commonplace.

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<sup>1</sup> M Eliade, *The Encyclopaedia of Religion* (Macmillan, New York 1987) Vol 12, 511.

<sup>2</sup> 'Sacred Spaces and Sacred Places' Course 559V <<http://www.ualberta.ca/ST.STEPHENS/sw-559V.htm>> accessed 28 June 2005.

and interrupt routine. The emphasis on qualities such as apartness, otherworldliness, orderliness and wholeness mark his definition of sacred.<sup>3</sup>

Sacred seems to be the essence of religion, according to Durkheim:

All known religious beliefs, whether simple or complex, present one common characteristic: they presuppose a classification of all things, real and ideal of which men think, generally designated by two distinct terms which are translated well enough by the words profane and sacred.<sup>4</sup>

Definitions on the *sacred* are mostly related to the 'consecrated'<sup>5</sup> and 'inviolable'. They suggest that someone does the consecration. Besides, sacred incorporates a notion of power, and efficacy, and sanctity. It expresses the virtue and strength which accompany certain beings, certain things and certain places.<sup>6</sup> Sacred also implies restrictions and prohibitions on human behaviour. Irrespective of the differences in various cultures, an observed common feature is that a sacred site is set apart, and different rules of behaviour apply in the observance of such a site, in order to show its significance.<sup>7</sup> A secular landscape is one concerned with everyday life like home, field, and industry, while the sacred would be identifiable as containing special places, for example, sites for ceremony and ritual, including tombs.<sup>8</sup> However, the experience of sacredness does not just focus on the extraordinary experiences alone, but also has relevance for the ordinary day-to-day experiences of individuals and their social life.<sup>9</sup>

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<sup>3</sup> YF Tuan, 'Sacred Space: Exploration of an Idea' in KW Butzer (ed), *Dimensions of Human Geography* (University of Chicago, Chicago 1978) 186.

<sup>4</sup> RA Jones, *Emile Durkheim: An Introduction to Four Major Works* (Sage, Beverly Hills, CA 1986) 124.

<sup>5</sup> For instance, the Shorter Oxford English Dictionary defines the word 'sacred' thus: consecrated to; esteemed; especially dear or acceptable to some religious purpose; made holy by association with a god or other object of worship. WR Trumble and others, *The Shorter Oxford English Dictionary* (5<sup>th</sup> edn OUP, Oxford 2002) 1871.

<sup>6</sup> C Radmilahy, 'Sacred Sites in Madagascar' in DL Carmichael and others (eds), *Sacred Sites, Sacred Places* (Routledge, London 1994) 82.

<sup>7</sup> J Hubert, 'Sacred Beliefs and Beliefs of Sacredness' in DL Carmichael and others (eds), *Sacred Sites, Sacred Places* (Routledge, London 1994) 11.

<sup>8</sup> G Cooney, 'Sacred and Secular Neolithic landscapes in Ireland' in DL Carmichael and others (eds), *Sacred Sites, Sacred Places* (Routledge, London 1994) 33.

<sup>9</sup> P Byrne, 'Religion and Religions' in S Sutherland and others (eds), *The World's Religions* (Routledge, London 1988) 24-6.

The meaning of 'space, place and site' needs further scrutiny as these terms usually overlap with each other in ordinary usage. Moriarty understands these terms as,

The meaning of place, space, site, and locality are conflated in everyday understanding though there are significant differences between them. On the one hand, place can be taken as a location of shelter, security, groundedness, memory, and dwelling and it can inspire wonder. On the other hand, space can be taken as a location of exposure, freedom, and openness and it can inspire amazement.<sup>10</sup>

Tuan highlights the difference between space and place which require each other for their definition. The difference could be summed up thus: space is abstract, it has the idea of openness and movement and offers freedom; whereas place suggests a concrete centre in which there are felt values and it is endowed with the idea of security and stability.<sup>11</sup> To identify a place, Edge argues that it must have boundaries in physical space. The law has an easier engagement with places that have concrete boundaries rather than those whose boundaries are less clearly delineated.<sup>12</sup>

Jackson and Henrie state that, 'sacred space does not exist naturally but is assigned sanctity as humanity defines, limits and characterises it through their culture, experience and goals'.<sup>13</sup> Eliade suggests that a sacred place is a 'microcosm' of the whole; because they are centres of the world. They 'stand out at the very heart of the universe and constitute an *imago mundi*.'<sup>14</sup> It means that sacred places are not only ancient places, but are also modern places as claimed by Roman Catholicism and Mormonism in the late nineteenth and twentieth centuries.<sup>15</sup> Therefore, sacred places are not necessarily the preserve of antiquity but they can continually be constructed.

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<sup>10</sup> G Moriarty, (1999) cited in PW Edge, 'The Construction of Sacred Places in English Law' (2002) 14 *Journal of Environmental Law* 161, 163.

<sup>11</sup> YF Tuan, *Space and Place: The Perspective of Experience* (Edward Arnold, London 1977) 6.

<sup>12</sup> D Cooper, 'Talmudic Territory? Space, Law and Modernist Discourse' (1996) cited in PW Edge, 'The Construction of Sacred Places in English Law' (2002) 14 *Journal of Environmental Law* 161, 163.

<sup>13</sup> Jackson and Henrie (1983) cited in CC Park, *Sacred Worlds: An Introduction to Geography and Religion* (Routledge, London 1994) 94.

<sup>14</sup> M Eliade, *Patterns in Comparative Religion* (Sheed and Ward, London 1958) 271.

<sup>15</sup> D Davies, 'Introduction: Raising the Issues' in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 4.

For our purpose, the definition of 'site' gains importance in understanding the Ayodhya dispute. Therefore, the subsequent paragraphs will attempt to define what a site and a sacred site would mean.

The Shorter Oxford English Dictionary defines 'site' as an area of ground upon which a building ... has been built or which is set apart for some purpose.<sup>16</sup> Site, then, seems to have a permanent geographical nexus and has a consistent use within the wider landscape and community. However, site is a term which has been subject to legal discussion. The Metropolis Management Act 1878, defines the term *site* 'in relation to a house, building, or other erection shall mean the whole space to be occupied by such house, building or other erection, between the level of the bottom of the foundations and the level of the base of the walls'.<sup>17</sup> In a significant case, *site* is defined as, 'a specific area of land set aside for operations such as building and general development'.<sup>18</sup>

From the above definitions, one can infer that 'site' is a place where a building was, is, or will be situated. It significantly differs from the definitions of space and place. Site, therefore, adds the idea of a human construction.

Jane Hubert observes that defining 'sacred site' among different peoples and in varying contexts is difficult, but when the land comes under threat, then, sacred sites, and sites of special significance, become identifiable, and the communities concerned will fight to preserve and protect them from disturbance, interference or destruction.<sup>19</sup> Finally, the definition given by Carmichael in *Sacred Sites and Sacred Places*, 'a sacred site is an area with its buildings, set apart, consecrated, and reserved for religious and ceremonial functions hence not to be violated,'<sup>20</sup> seems comprehensive.

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<sup>16</sup> CT Onions (ed), *The Shorter Oxford English Dictionary on Historical Principles* (3<sup>rd</sup> edn Clarendon Press, Oxford 1973) 1993.

<sup>17</sup> The Metropolis Management and Buildings Acts Amendment Act 1878 (C 32) s 14.

<sup>18</sup> *Barking and Dagenham LBC v Mills & Allen Ltd* (1997) 3 PLR 1. In this case, to define a site, the judge quoted Regulation 2 from the Town and Country Planning (Control of Advertisements) Regulations 1989.

<sup>19</sup> J Hubert, 'Sacred Beliefs and Beliefs of Sacredness' in DL Carmichael and others (eds), *Sacred Sites, Sacred Places* (Routledge, London 1994) 18.

<sup>20</sup> GHO Abungu, 'Islam on the Kenyan Coast: An Overview of Kenyan Coastal Sacred Sites' in DL Carmichael and others (eds), *Sacred Sites, Sacred Places* (Routledge, London 1994) 152.

Based on the above analysis, this thesis proposes that a sacred site refers to a specific geographical area with religiously significant buildings or structures, consecrated, and holding regular religious and ceremonial functions.

### **2.3. International legal system**

Religion remains a significant factor in human history. Studies show a religious resurgence in the last two decades.<sup>21</sup> Religious revival also suggests a growing relationship between religion and politics. In addition, the surging immigration in a globalised world has transformed the monolithic nature of many states into religiously plural societies. Consequently, major religions have international presence. They are no longer restricted to a particular region or country, although some religions have more geographical and historical affiliations.<sup>22</sup> Hence, granting freedom of religion to various communities has become a matter of concern for the international law.

In the developing world, the divide between the rich and poor has provoked the unemployed youth to take shelter in militant religious organisations, as is the case in the Ayodhya dispute. And, in cases where the state identifies itself with a majority community or follows the dictates of a state religion, the rights of religious minorities are jeopardised. Furthermore, if any existing religious disputes are fused with politics or used to enhance political power, it threatens the democratic and pluralistic foundations of a society.

During religious conflicts, sacred sites of religious communities become the target of attack. The spill over effect often invokes internal tension and international discord. Hence the need to look into the international human rights law provisions, to examine whether there is adequate protection offered for sacred sites from attacks such as desecration, defilement and destruction.

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<sup>21</sup> For details, J Casanova, *Public Religions in the Modern World* (Chicago University Press, Chicago 1994); J Haynes, *Religion in Global Politics* (Longman, Harlow 1998).

<sup>22</sup> L Gearon, 'General Introduction' in L Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 3.

The fundamental right to freedom of religion is set out in declarations such as the Universal Declaration on Human Rights (UDHR)<sup>23</sup>, 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981 Declaration on Religious Intolerance)<sup>24</sup> and guaranteed in the International Covenant on Civil and Political Rights (ICCPR)<sup>25</sup>. The right to freedom of religion positively includes the right to manifest one's faith in worship 'alone or in community'. However, this 'worship' may be conducted in a definite place which is considered sacred to the followers of a particular religion. The UDHR and the 1981 Declaration on Religious Intolerance are non-binding documents and only the ICCPR has binding obligations on the states. Although apparently, protection of sacred sites is not covered in the ICCPR, the General Comment No. 22 on freedom of religion issued by the Human Rights Committee refers to 'the concept of worship ... including the building of places of worship'.<sup>26</sup>

An analysis of the 1981 Declaration on Religious Intolerance shows that it is a major development in codifying religious rights at the international level.<sup>27</sup> Article VI, a significant article in the 1981 Declaration, includes the right to worship and assemble and 'to establish and maintain places for these purposes'.<sup>28</sup> It may be argued that the words 'to establish and maintain' incorporate the idea of protection of sacred sites in a wider perspective. However, if this clause is applied as a narrow definition by states during times of disputes, it may deny the protection to such sites. To avoid such ambiguous language, the Declaration could have included protection of sacred sites in unequivocal terms. The analysis includes the reports of the Special Rapporteurs on freedom of religion or belief which highlight the attacks on sacred sites in many states, and records related human rights violations of a religious community.

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<sup>23</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>24</sup> United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, UNGA Res 36/55 (25 November 1981) UN Doc A/RES/36/55.

<sup>25</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>26</sup> UNCHR 'General Comment 22 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1994) UN Doc HRI/GEN/1/Rev.7 [4].

<sup>27</sup> DJ Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1998) 82 AJIL 487, 488.

<sup>28</sup> S Liskofsky, *Eliminating Intolerance and Discrimination Based on Religion or Belief: The UN Role. Reports on the Foreign Scene, No.8* (American Jewish Committee, New York 1968) 468.

With regard to the regional human rights treaties, the European Convention on Human Rights (ECHR)<sup>29</sup>, the American Convention on Human Rights (ACHR)<sup>30</sup>, and the African Charter on Human and Peoples' Rights<sup>31</sup> also cover religious freedom as a fundamental human right. Nevertheless, they have no such provisions to protect sacred sites during times of disputes. Although there is an increasing awareness among various states to protect the indigenous sacred sites in their respective countries, sacred sites such as churches, mosques, and temples of established religions do not seem to enjoy any protection under international human rights law. Since most of the human rights treaties grant and promote individual rights rather than collective rights, the protection of sacred sites may not have found a place in these treaties. However, the research highlights the fact that collective right of protection of sacred sites is significant for the individual and group to exercise their faith in worship.

Another area the research incorporates is the protection of religious minority rights for protecting sacred sites. As seen earlier, minorities have become significant in a globalised world and sacred sites often play the role of identity icons. When tension arises due to socio-political and economic reasons, these religious symbols become easy targets of attack from the state, non-state actors and co-religionists. Therefore, the analysis of international and regional human rights instruments cover Article 27 of the ICCPR, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992<sup>32</sup> (hereafter the 1992 Declaration), the Framework European Convention for the Protection of National Minorities 1995<sup>33</sup> and the OSCE High Commissioner on

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<sup>29</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

<sup>30</sup> American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 at 1 (1969) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V /II.23 Doc 21 Rev 6 (1979).

<sup>31</sup> The African Charter on Human and peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 ILM 58 (African Charter).

<[http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html)> accessed 10 March 2007.

<sup>32</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA Res 47/135.

<sup>33</sup> Framework European Convention for the Protection of National Minorities (Strasbourg I.II.1995) ETS No 157 <<http://conventions.coe.int/Treaty/en/Treaties/Word/157.doc>> accessed 24 May 2007.

National Minorities,<sup>34</sup> becomes vital in protecting sacred sites as part of the rights of minorities to freedom of religion.

The UDHR does not contain any provision for the protection of minority rights. The phrase 'religious minority' applies to any group adhering to a defined set of religious beliefs.<sup>35</sup> Religious minorities are those groups that profess and practice a religion that differs from that of the majority of the population. It is an established fact that the rights of minorities have a collective dimension<sup>36</sup> and Dinstein observes that 'without the collective element, the individuals rights could easily become devoid of any substance'.<sup>37</sup> Article 27 of the ICCPR creates an obligation for state parties not to deny persons belonging to minorities the common 'practice of their religion' because 'minority rights enrich the fabric of society as a whole'.<sup>38</sup>

For the religious minorities, sacred sites provide identity and become a sign of their presence in a particular area, surrounded by many other religious communities. However, the rights granted under Article 27 of the ICCPR to religious minorities do not cover protection of their sacred sites. Moreover, the right covered under Article 27 is only 'persons belonging to such minorities' and not to a 'minority group as such'. This will be examined further in chapter four.

The UN addressed the issues of minorities through a special human rights instrument called the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, or Linguistic Minorities. Although the aim of the 1992 Declaration on Minorities is establishing 'equality' by prohibiting 'discrimination', as a UN General Assembly

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<sup>34</sup> CSCE Helsinki Decisions (1992) 35 ILM 1385 <<http://www.osce.org/hcnm/>> accessed 4 June 2006.

<sup>35</sup> Y Dinstein, 'Freedom of Religion and the Protection of Religious Minorities' in DA Reidy and MNS Sellers (eds) *Universal Human Rights: Moral Order in a Divided World* (Rowman & Littlefield, New York, 2005) 147-9.

<sup>36</sup> P Thornberry, *International Law and Rights of Minorities* (Clarendon Press, Oxford 1991) 57.

<sup>37</sup> Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102, 102.

<sup>38</sup> UNCHR 'General Comment 23 in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1994) UN Doc HRI/GEN/1/Rev.7 [1] states that the protection of minority rights is directed towards ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.



Resolution, its achievement is limited.<sup>39</sup> The rights of religious minorities are not delineated in the declaration and it fails to include a right to establish, maintain and protect sacred sites. Hence, it does not set out any new rights other than those protected in Article 27 of the ICCPR.

As an attempt to attend to the needs of religious minorities in the European region, a regional Framework Convention is adopted by the Council of Europe. This prohibits discrimination on the 'grounds of belonging to a national minority'. Although Article 8 of the Framework Convention sets out the right to manifest one's religion or belief, this convention is limited in protecting sacred sites since the state parties undertake only 'to recognise' the right and do not undertake 'to protect' this right. Moreover, Article 6(2) emphasises the protection only to 'persons' and not to their 'institutions'.<sup>40</sup> Non-recognition of 'collective rights' does not guarantee the rights for religious minorities to establish, maintain, and protect their sacred sites when they come under attack.

A further area of question is that of property rights. Generally, sacred sites are owned by religious communities and any limitations on the use of such sites are considered as an infringement of property rights as set out in human rights law. Moreover, any attacks on them violate the right of enjoyment free from any interference from others. Hence, sacred sites, like any other property, call for protection from the state and its authorities.

Right to property is stated as a fundamental right only under the UN Declaration, the UDHR.<sup>41</sup> Property right as a fundamental right has failed to find a place in the international human rights covenants such as the ICCPR and the ICESCR<sup>42</sup>. This is due to the failure among the state parties to reach any agreement on an acceptable text.<sup>43</sup> However, the

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<sup>39</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 316.

<sup>40</sup> Framework European Convention for the Protection of National Minorities (n 33) art 6(2): The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

<sup>41</sup> UDHR (n 23) art 17: (1) Everyone has the right to own property alone as well as in association with others (2) No one shall be arbitrarily deprived of his property.

<sup>42</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>43</sup> UNGA 'Report of the Secretary-General' 2929 (1955) UN Doc A/2929, 65-67.

regional human rights treaties<sup>44</sup> have incorporated the right to property as a fundamental right without any unjust interference from the state as to its use.

Sacred sites as property owned by a religious community often suffer intrusion from the state authorities. States impose restraints such as restrictions on planning permission and registration of sacred sites. This curtails access to sacred sites for adherents of a particular religion, and in many states these procedures are used to restrict the structural aspects of religious practice.<sup>45</sup> Many examples are recorded by the Special Rapporteurs on Freedom of Religion or Belief<sup>46</sup> to show how states use planning permission and registration procedures to limit the free exercise of religious faith through worship on sacred sites.<sup>47</sup> The reports highlight the limitations imposed on sacred sites and demonstrate that states and non-state actors do limit the right to freedom of religion through restrictive practices related to the establishment, maintenance, access and protection of sacred sites.

Finally, since sacred sites are also perceived as cultural properties of humanity, whether international covenants on rights to cultural properties during times of armed conflict cover protection of sacred sites is examined. During war and armed conflicts, sacred sites, belonging to an enemy state, become the target of attacks. This became a significant concern of the states during the 19<sup>th</sup> century. The insolent destruction of sacred sites and other significant monuments during the two World Wars led the world community to adopt conventions to protect cultural properties from the scourge of war.<sup>48</sup>

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<sup>44</sup> For instance, Article 1 of the First Protocol to the ECHR, Article 21 in the ACHR and Article 14 in the AFCHPR cover the protection of rights to property.

<sup>45</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 242.

<sup>46</sup> Until 2005, they were known as Special Rapporteurs on Religious Intolerance. This 'Thematic Mandate' is established by UNCHR Res 1986/20. The present Special Rapporteur is Ms Asma Jahangir.

<sup>47</sup> UNCHR 'Reports of Special Rapporteurs on freedom of Religion or Belief' UN Doc E/CN.4/1988/45; E/CN.4/1989/44; E/CN.4/1990/46; E/CN.4/1991/56; E/CN.4/1992/52; E/CN.4/1993/62; E/CN.4/1994/79; E/CN.4/1995/91; E/CN.4/1995/91/Add.1 (Reports on specific incidents on various countries); E/CN.4/1996/95; E/CN.4/1997/91; E/CN.4/1998/6; E/CN.4/1999/58; E/CN.4/2000/65; E/CN.4/2001/63; E/CN.4/2002/73; E/CN.4/2003/66; E/CN.4/2004/63; E/CN.4/2005/61; E/CN.4/2006/5; and A/HRC/4/21.

<sup>48</sup> Among the international legal instruments, 1977 Protocol I Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 and Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 609 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and Hague Convention for the Protection of Cultural property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240

However, this protection is extended only during times of war or armed conflict. During peacetime, there seems to be no provision to protect such sacred sites and the above-mentioned conventions are also not helpful in protecting sacred sites from attacks at all times. The inadequacy of these conventions and protocols was exposed during the conflicts of the Iran-Iraq War, the invasion of Kuwait by Iraq, Yugoslavia, particularly the Bosnia and Herzegovina conflicts and the destruction of the Bamiyan Buddha statues in Afghanistan. In a subsequent UNESCO general conference, it was accepted that the international system of safeguards of the world cultural heritage did not appear to be satisfactory.<sup>49</sup> Various efforts have been taken in the last ten years to protect the significant sites during times of war or armed conflict.

The international conventions and declarations contain hardly any provisions to offer protection to sacred sites during times of peace. Although a fully-fledged conventional war among states may have become a distant reality, conflicts within a state have increased in recent decades. When such conflicts assume religious character, the attacks over sacred sites may be inevitable and religious sentiments over sacred sites lead to spiralling violence for decades. In such moments, the existing international law to protect sacred sites as cultural properties seem to be insufficient and this gap needs to be covered to protect sacred sites of all communities at all times.

Regional human rights treaties are a development of international human rights law in protecting and promoting human rights across the world. Their significance in protecting such rights is owed to the binding obligations on member states imposed by the regional human rights courts. Hence, this study proposes a regional human rights treaty, including a human rights court, to protect sacred sites for the South Asian region.

## **2.4. Indian Legal System**

Before a detailed discussion on the present Indian legal context, it is necessary to consider the constitutional and historical background against which the Indian legal system has

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(1954 Hague Convention on Cultural Property) are significant in offering protection to significant places of worship during armed conflicts.

<sup>49</sup> Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP, Cambridge 2006) 237.

developed. R.K. Agrawala suggests that 'a legal system is the locale. The past explains it, and it foretells the future'.<sup>50</sup> Though India's indigenous legal tradition existed for approximately two thousand years, its present form has inherited little from the past Hindu and Muslim rules. The present system is based on the British legal system which existed in parts of India for two hundred years before independence in 1947.

#### 2.4.1. Development of the Indian Constitutional and Legal Order

The *Mughal* rule in India was established by Babar in 1526, and it deteriorated after the death of *Aurangzeb* in 1707.<sup>51</sup> When Mughal emperors ruled India, at the close of the sixteenth century, a few merchants from London resolved to forge trade links with India. On 24 September 1599, they formed the 'East India Company'. Based on their application for the grant of royal recognition, on 31 December 1600, Queen Elizabeth I granted the first Royal Charter<sup>52</sup> which conferred certain legislative powers on the company to make, ordain, and constitute as many reasonable laws as necessary to solve their disputes.<sup>53</sup> British traders, with the permission of the respective Indian governments, had settled in different parts of the country.<sup>54</sup> Disputes among the British in these early settlements were, with the permission of the local governments, adjudicated by English law and the British were allowed by the rulers to have their own administration in their settlement area.<sup>55</sup> Initially, the courts and the legislature were intermixed with the executive. The executive was the governor and his council appointed by the company for each settlement.<sup>56</sup>

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<sup>50</sup> RK Agrawala, 'History of Courts and Legislatures' in J Minattur (ed), *The Indian Legal System* (Oceana, New York 1978) 103.

<sup>51</sup> Ibid 105.

<sup>52</sup> AB Keith, *A Constitutional History of India* (Methuen & Co, London 1936) 1. According to the terms of the first Charter, the Company had a democratic constitution. All the members of the Company constituted the General Body which elected annually, a Governor and twenty-four Directors of the Company, in whom the government of the Company was vested.

<sup>53</sup> CP Ilbert, *The Government of India* (Clarendon Press, Oxford 1915) 3 10.

<sup>54</sup> For instance, the traders settled in Surat (1612), Bombay (1668), Madras (1639) and Calcutta (1690). RM Jois, *Legal and Constitutional History of India* (Tripathy, Bombay 1984) Vol II, 247.

<sup>55</sup> RK Agrawala, 'History of Courts and Legislatures' in J Minattur (ed), *The Indian Legal System* (Oceana, New York 1978) 103.

<sup>56</sup> Ibid 105. Though not legal specialists, these Englishmen were generally acquainted with their own legal system. The Englishmen were forced to formulate a process of law and order which they were familiar with due to the weakness of operating an indigenous legal system.

Subsequently, another charter was issued by Charles II in 1661<sup>57</sup> which authorised the governor and council to function as a court for all civil, criminal and other matters for their employees.<sup>58</sup>

In 1726, George I issued a further charter, which endowed the three principal settlements or presidency towns, of Madras, Bombay and Calcutta with a Mayor's Court.<sup>59</sup> The governor and council of each presidency town were given legislative power.<sup>60</sup> Since the 1726 Charter could not lend sufficient power to the growing authority of the company, and also owing to its malpractices, in 1773 the British Government intervened in Indian affairs with the Regulating Act.<sup>61</sup> This Act replaced the Mayor's Courts with a Supreme Court through a royal charter,<sup>62</sup> and placed an independent judiciary under the control of the Crown rather than of the company.<sup>63</sup> These judges appointed by the Crown, exercised jurisdiction over civil, criminal, admiralty and ecclesiastical matters,<sup>64</sup> and established their own rules of procedure.<sup>65</sup> Outside of the presidency areas, however, the company continued to exercise jurisdiction through civil and criminal courts.<sup>66</sup> The collector of the district, an Englishman, presided over the former and supervised the latter, which had mostly Muslim officers.<sup>67</sup> Later, the Charter Act of 1833<sup>68</sup> defined the power of the East India Company to be continued until 30 April 1854.

Following the mutiny of Indian soldiers in 1857, India was declared to be a British Dependency in 1858.<sup>69</sup> In 1861, the passing of the Indian High Courts Act<sup>70</sup> abolished the

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<sup>57</sup> Charter issued by Charles II on 3 April 1661.

<sup>58</sup> AB Keith, *A Constitutional History of India* (Methuen & Co, London 1936) 7-9.

<sup>59</sup> CP Ilbert, *The Government of India* (Clarendon Press, Oxford 1915) 31-2.

<sup>60</sup> RM Jois, *Legal and Constitutional History of India* (NM Tripathi, Bombay 1984) Vol II, 248.

<sup>61</sup> Regulating Act 1773 (13 Geo III c 63).

<sup>62</sup> A Charter was issued on 26 March 1774 by King George III.

<sup>63</sup> AB Keith, *A Constitutional History of India* (Methuen & Co London, 1936) 71 3; CP Ilbert, *The Government of India* (Clarendon Press, Oxford 1915) 40-50.

<sup>64</sup> Regulating Act 1773 s 13. See, RM Jois, *Legal and Constitutional History of India* (NM Tripathi, Bombay 1984) Vol II, 123.

<sup>65</sup> Ibid .

<sup>66</sup> The judicial organization provided by the Company in the 'mofussils' was called the *adalat* system. *adalat* means 'court' in Arabic.

<sup>67</sup> BP Mishra, *The Judicial Administration of the East India Company in Bengal* (Motilal Banarsidas, Delhi 1947) 168-82.

<sup>68</sup> 3&4 Will IV C 85.

<sup>69</sup> The Government of India Act 1858 (21 & 22 Vict c 106).

supreme courts and lower courts and established in their place a High Court of Judicature for each presidency. The creation of the High Court was a significant attempt in developing a unified system of law and administration of justice in the country with appellate authority to the Privy Council.

In 1935, as an attempt to commence federal polity in India, the British parliament framed the Government of India Act. The Act considered setting up a federation consisting of British Indian provinces and native states.<sup>71</sup> Legislative powers of the federation and the component units were demarcated through three lists, which are accommodated in the Indian Constitution. The three lists, each with added items, are the Union List, State List and Concurrent List, which delineate the powers of the federal government.<sup>72</sup>

In 1937, a federal court was established to try disputes between the federation and the provincial units and disputes arising between provincial units.<sup>73</sup> It enjoyed appellate jurisdiction over the High Courts,<sup>74</sup> but was subject to the appellate authority of the Privy Council.<sup>75</sup> In its advisory jurisdiction it could render advice to the governor general on any legal matter of public importance.<sup>76</sup> As we will see later, this federal court was a major precursor of the modern Supreme Court of India.<sup>77</sup>

When the British Government unilaterally involved India in the Second World War in 1939, as a reaction to this imperialistic action, the Congress<sup>78</sup> ministers resigned and in 1942, Gandhi<sup>79</sup> launched the 'Quit India' movement, which sparked off anti-British sentiments throughout the country. In the post-war period, as a first step towards

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<sup>70</sup> The Indian High Courts Act 1861 (24 & 25 Vict c 104).

<sup>71</sup> Native States were territories ruled by independent kings during British rule. During independence, approximately 600 such states existed in India.

<sup>72</sup> Article 246 of the Indian Constitution (Seventh Schedule) contains the three lists.

<sup>73</sup> Government of India Act 1935 s 200. The federal court was established in India on 6 December 1937. See, RM Jois, *Legal and Constitutional History of India* (NM Tripathi, Bombay 1984) Vol II, 217.

<sup>74</sup> Government of India Act 1935 s 207.

<sup>75</sup> Government of India Act 1935 s 212.

<sup>76</sup> Ibid.

<sup>77</sup> For a general understanding of history of courts and legislatures in India, refer, RK Agrawala, 'History of Courts and Legislatures' in J Minattur (ed), *The Indian Legal System* (Oceana, New York 1978) 103-132.

<sup>78</sup> Indian National Congress Party which headed most of the provincial governments during 1935-1947.

<sup>79</sup> Gandhi led the freedom struggle against British rule from 1915 until 1947.

independence, the British Government proposed a constituent assembly represented by all major political and religious groups in India. The responsibility of the Constituent Assembly was the creation of a new constitution for an independent India for which members were elected by the provincial legislatures during the winter of 1945-'46.

When the Muslim League<sup>80</sup> under the leadership of Jinnah chose not to participate in the Constituent Assembly, the proposal for the partition of the country became inevitable.<sup>81</sup> On 3 June 1947, Mountbatten, Viceroy since March, explained to the leaders of the Muslim League and the Indian National Congress about the plan for the partition and fixed 15 August 1947 as the date of transfer of power. The British parliament passed the Indian Independence Act 1947 giving legal sanction for partition of India into India and Pakistan.<sup>82</sup> The passing of the act marked the end of British rule in India and the division of India into two sovereign nations.<sup>83</sup>

After independence, the Constituent Assembly accelerated its activities to create a constitution for the independent India. The framers of the Indian constitution drew inspiration from three main sources.<sup>84</sup> The first source was the Government of India Act 1935, which provided the basis for national and provincial government until the newly framed constitution replaced it in 1950. The second source was the Objectives Resolution adopted during the December 1946<sup>85</sup> Assembly session which called for adequate safeguards for minorities, depressed and backward classes, and also for underdeveloped and tribal areas.<sup>86</sup> The third source was other constitutions of countries like the United

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<sup>80</sup> Muslim League is a political party established in 1906 to protect the interests of Muslims.

<sup>81</sup> BR Nanda, 'Nehru, The Indian National Congress and the Partition of India, 1953-47' in CH Philips and MD Wainwright (eds) *The Partition of India: Policies and Perspectives 1935-1947* (George Allen and Unwin, London 1970) 187.

<sup>82</sup> S Rao, *The Framing of India's Constitution* (The Indian Institute of Public Administration, New Delhi 1968) Vol I, 529-30.

<sup>83</sup> Indian Independence Act 1947 s 1 provided 'setting up of two independent dominions named as India and Pakistan with effect from 15 August 1947'.

<sup>84</sup> G Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP, Delhi 1999) 4.

<sup>85</sup> Nehru drafted these resolutions stating that the Indian Union, whose integrity was to be maintained, derived its authority and power from the Indian people. It declared that there should be secured to all the people, justice - social, economic, and political; equality of status and of opportunity, and before the law, freedom of thought, expression, belief, worship, vocation, association, and action, subject to law and public morality. For details of Objectives Resolution, see, Constituent Assembly Debates Vol I, No 5, 59.

<sup>86</sup> Ibid.

Kingdom, Ireland, USSR, and the USA, for the sections dealing with fundamental rights, and directive principles of state policy.

When the members of the Constituent Assembly met to draft the constitution, they encountered a number of problems. Firstly, they realised that it was a formidable task to construct a uniform system of governance in a nation known for its economic, social and religious diversity.<sup>87</sup> Austin argues that the Indian constitution was predominantly a social document seeking to change traditional social beliefs and practices. The members were aware that the document had to be contextualised in relation to the challenges that the country faced.<sup>88</sup> McHugh states that the meticulous attention paid to each article was the result of the tumultuous political and social context surrounding the constituent assembly.<sup>89</sup>

Secondly, the framers of the Indian constitution were conscious of the religious strife dividing the nation at the time of independence. As was noted previously, India's independence was accompanied by the partition of the country into Muslim majority Pakistan and Hindu majority India.<sup>90</sup> This partition led to a massive loss of lives and forced millions to evacuate their lands. Most of the provinces in northern India were engulfed in an orgy of violence for months preceding and after independence.<sup>91</sup> The partition promoted more religious hatred and violence. Bloodshed, upheaval and migration were, therefore, the structural legacies of partition.<sup>92</sup> The assassination of Gandhi by Nataraj Godse, member of a Hindu militant organisation, gave more reason for the framers to concentrate on bringing more amity between the religious communities through various provisions in the constitution.

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<sup>87</sup> S Parikh, 'Enshrining a Secular Idol: A Judicial Response to the Violent Aftermath of Ayodhya' (2005) 37 Case W Res J Int'l L 85, 90.

<sup>88</sup> G Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, Oxford 1966) 50.

<sup>89</sup> JT McHugh, *Comparative Constitutional Traditions* (Peter Lang, Oxford 2002) 103.

<sup>90</sup> DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 79.

<sup>91</sup> B Graham, *Hindu Nationalism and Indian Politics: The Origins and Development of the Bharathiya Jana Sangh* (CUP, Cambridge 1990) 1. Bruce Graham observes that 'people looked forward to the creation of a new political order, one in which the problems and conflicts associated with the British Raj would vanish like the morning mist. Instead the nation found itself exposed to a high degree of stress and instability... the communal rioting which had accompanied partition threatened to undermine it'.

<sup>92</sup> DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 78.



Finally, traditional Indian society was based on a hierarchical caste system which had within it many inequalities. ‘Caste is based on classification of people through attribution of specific social ranks determined by descent’ observes Siraj Sait.<sup>93</sup> The framers of the constitution strove to create a fundamentally different, more egalitarian, Indian society, all of which called for a revolutionary document.<sup>94</sup> The result was that the framers of the constitution established a democratic form of government based on secular principles.

The Constitution of India is divided into 22 Parts and 12 Schedules. Part III includes explicit safeguards for individual liberties, modelled on the US Bill of Rights.<sup>95</sup> These protections are referred to as the “Fundamental Rights” provisions. They incorporate the guarantee of equality before the law and the right of equal protection of the laws;<sup>96</sup> protection from discrimination;<sup>97</sup> the right to speech and assembly;<sup>98</sup> the right to life and liberty;<sup>99</sup> the right to freedom of religion; protection of minority interests<sup>100</sup> and also the right to judicial enforcement of the Fundamental Rights protection.<sup>101</sup> The details of the Fundamental Rights, as interpreted by the courts, will be dealt with later in this chapter.

The constitution defines India as a union of states, and therefore states play a fundamental role in India’s federal set-up,<sup>102</sup> and as such they are specified in the First Schedule of the Constitution. Before independence, they were known as provinces and in every province, there existed several languages. The States Reorganisation Commission was formed in 1953 to study the problems involved in redrawing state boundaries. As to the State

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<sup>93</sup> M Siraj Sait, *Inheriting a Life without Dignity: A Call to the United Nations to Address Caste-based Discrimination* (Minority Rights Group International, London 2001) 1.

<sup>94</sup> MC Vandermay, ‘The Role of the Judiciary in India’s Constitutional Democracy’ (1996) 20 *Hastings Int’l & Comp L Rev* 103, 103.

<sup>95</sup> US Constitutional Amendments I-X.

<sup>96</sup> Indian Constitution art 14.

<sup>97</sup> Indian Constitution art 15-16.

<sup>98</sup> Indian Constitution art 19.

<sup>99</sup> Indian Constitution art 21.

<sup>100</sup> Indian Constitution art 25-30.

<sup>101</sup> Indian Constitution art 32.

<sup>102</sup> Indian Constitution art 1(1).

Reorganisation Act 1956,<sup>103</sup> the states boundaries were redrawn and at present, India has twenty-eight states and seven union territories.

## **2.4.2. Separation of Powers**

A key feature in understanding the Ayodhya dispute is the interaction between federal and state authorities, as well as between legislature, executive, and judiciary. This section considers both the federal system of India, and the relationship between the executive and the legislature. Because of the central importance of the judiciary to the dispute, the judiciary is considered separately, in the following section.

### **2.4.2.1. Federal nature of the Indian state**

The Indian constitution, which took effect on 26 January 1950, created a federal government combining elements of the British parliamentary and US constitutional models.<sup>104</sup> The constitution of India declared the country to be a 'sovereign socialist secular<sup>105</sup> democratic republic'.<sup>106</sup> The Indian constitution is a combination of federal and unitary models; though essentially federal in character, the union has been given the power to encroach upon the field reserved for states in certain contingencies, for instance, in case of emergencies.<sup>107</sup> The reason behind this is that until independence, India was never a single political unit and it had always been a multi-religious, multi racial, multi-lingual, and plural society.<sup>108</sup>

Moreover, while gathering together to frame a constitution for independent India in the aftermath of the religious strife which existed in the country after partition, the framers had

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<sup>103</sup> The Constitution (Seventh Amendment) Act, 1956 with effect from 1 November 1956.

<sup>104</sup> G Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, Oxford 1966) 34.

<sup>105</sup> The words 'socialist and secular' were added to the Preamble of the Constitution by the Constitution (Forty-second Amendment) Act 1976.

<sup>106</sup> The Preamble of the Indian Constitution.

<sup>107</sup> Part XVIII of the Constitution (articles 352-360) explains the emergency provisions: a threat by war or external aggression or by internal disturbances; a failure of constitutional machinery in the country or in a state; and a threat to the financial security. Under the first two categories, the fundamental rights, with the exception of protection of life and personal liberty, may be suspended.

<sup>108</sup> SC Kashyap, 'Executive-Legislature Interface in the Indian Polity' (2004) 10 *The Journal of Legislative Studies* 278, 278.

to make difficult decisions concerning the political structure of India. It was decided that India was to be governed by a federal system which had at its centre a strong union government compared with the weaker, individual component states. Kachwaha argues that to avoid the risk of disintegration, a strong union government was required to administer such a large and diverse nation.<sup>109</sup> In the words of Ambedkar<sup>110</sup> ‘our constitution would be both unitary as well as federal according to the requirements of time and circumstances.’<sup>111</sup>

In a federal set-up, delineation of power between the union and the states is very significant. Regarding legislative power, it is vested mostly with the parliament and state legislatures, though occasionally other bodies or organs are permitted to legislate at local levels.<sup>112</sup> The subject matter of legislation is clearly distributed between the two as laid down in three lists,<sup>113</sup> which are mainly based on the pattern under the Government of India Act 1935. The three lists are the Union, the State, and the Concurrent.

Parliament has exclusive authority to legislate on any of the ninety-seven items on the union list, while the state list includes sixty-six items that are under the exclusive jurisdiction of state legislatures. The union government and state governments exercise concurrent jurisdiction over forty-seven items on the concurrent list for the purpose of securing legal and administrative unity throughout the country. It is important that the laws passed by the parliament relevant to concurrent list areas take precedence over laws passed by state legislatures.<sup>114</sup> The concurrent list includes the Criminal Law, which includes all matters in the Indian Penal Code, (including religious offences), and religious personal laws.

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<sup>109</sup> M Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (PLOOM and CIJL, Leiden 1998) 14.

<sup>110</sup> Ambedkar is known as ‘the Father of the Constitution’. On 29 August, 1947, the Constituent Assembly set up a Drafting Committee under the Chairmanship of BR Ambedkar to prepare a Draft Constitution for independent India. <<http://parliamentofindia.nic.in/ls/debates/facts.htm>> accessed 1 March 2006.

<sup>111</sup> Constituent Assembly Debates Vol VII part I, 34.

<sup>112</sup> These local bodies include the *Panchayats* (Indian Constitution articles 243, 243A – 243O) and the *Municipalities* (articles 243P – 243ZG).

<sup>113</sup> Indian Constitution art 246.

<sup>114</sup> Indian Constitution art 249.

For effective functioning of the federal system, the Indian Constitution empowers the union to give directions to the states.<sup>115</sup> Where a state fails to comply with union directions, the president can lawfully hold that the government of the state cannot be carried on in accordance with the provisions of the Constitution.<sup>116</sup> The consequences of such a situation are dealt with in article 356 which contains provisions for failure of constitutional machinery in the state.<sup>117</sup> However, this power to implement President's Rule in a state is subject to judicial review. For instance, in the *Bommai*<sup>118</sup> case, the Supreme Court struck down a proclamation made by the President of India under Article 356.

A significant provision in the constitution is Article 355. Article 355 overrides all state laws to the extent that they conflict with, or hamper the discharge of, the duty imposed on the union by that article which falls into two parts. The first part runs, 'it shall be the duty of the union to protect every state against external aggression and internal disturbance', and the second part runs, 'and to ensure that the government of every state is carried on in accordance with the provisions of this constitution'. It shows clearly that when the union is apprised of a situation in which internal peace is threatened, it must take all necessary steps, including the use of armed force, to prevent internal disturbance.<sup>119</sup>

#### 2.4.2.2. Organisation of Parliament

The constitution has adopted a bicameral legislature based on the Westminster Model.<sup>120</sup> The Union Parliament comprises of the President, the Council of States (*Rajya Sabha*) and the House of the People (*Lok Sabha*).<sup>121</sup> *Rajya Sabha*, which is also known as the upper house, is elected from the legislatures of state and union territories and the Vice-President

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<sup>115</sup> Indian Constitution art 256, 257, 339(2), 350A, 353(a) and 360(3).

<sup>116</sup> Indian Constitution art 365.

<sup>117</sup> SC Kashyap, *Union-State Relations in India* (The Institute of Constitutional and Parliamentary Studies, New Delhi 1969) 12.

<sup>118</sup> *SR Bommai v Union of India* (1994) 2 SCR 165. This case is a landmark case in defining 'secularism' as a basic feature of the Indian Constitution.

<sup>119</sup> Government of India, *Report of the Commission on Centre-State Relations – Part I* (GOI, New Delhi 1988) 165-69.

<sup>120</sup> M Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (PLOOM and CIJL, Leiden 1998) 17.

<sup>121</sup> Indian Constitution art 79.

of India is its ex-officio chairman.<sup>122</sup> *Lok Sabha*, which is also known as the lower house, normally continues for a period of five years but is subject to earlier dissolution.<sup>123</sup> The members of *Lok Sabha* are directly elected by the voters in the states. In a caste-ridden Indian society, to ensure the participation of lower castes and tribes, seats are reserved for the Scheduled Castes (approximately 15%) and Scheduled Tribes (approximately 5%) in the *Lok Sabha*.<sup>124</sup> This reservation policy is expected to cease after sixty years.<sup>125</sup>

The legislative power given to parliament and state legislatures are not without limitations. According to the Constitution, the Indian Parliament or the state legislatures cannot pass a law violating the fundamental rights,<sup>126</sup> or one which violates the distribution of powers between the union and the states. Although the amending power of Parliament is affirmed after some contentious judicial pronouncements, certain provisions are possible only through a special majority in Parliament, whereas some others can be amended only through a further concurrence of at least half of the state legislatures, for example, federal provisions.<sup>127</sup> The amending power of Parliament over fundamental rights was a matter of dispute between the parliament and the judiciary for a few decades after independence. Although the amending power of Parliament is affirmed after some contentious judicial pronouncements,<sup>128</sup> it has no power to alter the 'basic structure' of the Constitution, a fact which was clearly established by a majority judgement of the Supreme Court in 1973 in the *Kesavananda* case.<sup>129</sup>

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<sup>122</sup> Indian Constitution art 64.

<sup>123</sup> Indian Constitution art 83.

<sup>124</sup> Indian Constitution art 330.

<sup>125</sup> Indian Constitution art 334: Reservation of seats and special representation to cease after *sixty-years* from the commencement of the Constitution. This 'sixty-years' substituted by the Constitution (seventy-ninth amendment) Act, 1999 for 'fifty-years' with effect from 25 January 2000.

<sup>126</sup> Indian Constitution art 13.

<sup>127</sup> Indian Constitution art 368.

<sup>128</sup> *Golak Nath v State of Punjab* AIR 1967 SC 1643; *Kesavananda Bharathi v State of Kerala* AIR 1971 SC 530; *Minerva Mills v Union of India* AIR 1980 SC 1789.

<sup>129</sup> *Kesavananda Bharathi v State of Kerala* AIR 1971 SC 530. In *Kesavananda*, the Supreme Court introduced the 'basic structure' doctrine and laid down a bold ruling stating that Article 368 does not enable parliament to alter its basic structure or the framework of the Constitution.

### 2.4.2.3. Role and powers of President and Governors

The Constituent Assembly opted for the parliamentary system of government because it preferred to have an executive that was answerable to the popularly elected legislature.<sup>130</sup> The term 'Executive' in the Indian polity covers the formal head of the executive, (the President), the real executive, (the Council of Ministers), and the permanent administration, the civil services.<sup>131</sup> As a republic, India has an elected President as its head.<sup>132</sup> The role of the President of India is conceived as that of a constitutional or formal executive and also head of state. The President acts only with the aid and advice of the Council of Ministers in the discharge of all his functions.<sup>133</sup> The Supreme Court through various decisions has upheld the position that the President is a constitutional head who must act on the advice of the Council of Ministers and that the real executive power in the Indian system is vested in the Council of Ministers.<sup>134</sup>

With regard to the powers, the President invites the leader of the party or parties who in his/her judgement is likely to command enough support to form the government.<sup>135</sup> In the absence of any session in both houses and where circumstances warrant an immediate action, the President, is empowered to legislate by ordinance.<sup>136</sup> The President can approach the Supreme Court for their opinion when a question of law or fact has arisen which is of national public importance.<sup>137</sup> Equally, he can refer a dispute to the Supreme Court for their opinion as for example the reference of the Ayodhya Dispute in 1993.<sup>138</sup> Another vital power of the President is declaring emergency in three circumstances.<sup>139</sup>

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<sup>130</sup> SC Kashyap, *Our Constitution - An Introduction to India's Constitution and Constitutional Law* (National Book Trust, New Delhi 2001) 46, 49.

<sup>131</sup> SC Kashyap, 'Executive-Legislature Interface in the Indian Polity' (2004) 10 *The Journal of Legislative Studies* 278, 279.

<sup>132</sup> Indian Constitution art 52.

<sup>133</sup> Indian Constitution art 74.

<sup>134</sup> *Samsher Singh v State of Punjab* AIR 1974 SC 2192; *Rao v Union of India* AIR 1971 SC 1002; *Ram Jawaya v State of Punjab* AIR 1955 SC 544.

<sup>135</sup> Indian Constitution art 75.

<sup>136</sup> Indian Constitution art 123.

<sup>137</sup> Indian Constitution art 143 (1).

<sup>138</sup> Indian Constitution art 143 (2).

<sup>139</sup> Indian Constitution art 352-360

Similarly, a Governor's relationship with the state legislature is similar to those of the President with Parliament.<sup>140</sup> Normally, the Governor discharges his responsibilities with the aid and advice of the Council of Ministers in a state,<sup>141</sup> except in respect of matters where one can act in their discretion under the constitution.<sup>142</sup> This power includes choosing the Chief Minister of the state, assenting bills,<sup>143</sup> reserving bills for the President's consideration, and informing the President of a constitutional crisis arising in the state, or in requiring the dissolution of the Legislative Assembly and calling for President's rule.<sup>144</sup>

#### **2.4.2.4. Role and powers of Prime Minister and Cabinet**

The Constitution of India represents a real mixture of the highest executive and legislative authorities. The relationship between the executive and the legislature is one that is friendly and they are not seen as competing centres of power but as inseparable partners in the business of government.<sup>145</sup>

The Cabinet, which is the Council of Ministers, with the Prime Minister at the head, is charged with the responsibility of governance on behalf of Parliament.<sup>146</sup> The Cabinet has unlimited right to initiate and formulate legislative and financial proposals before Parliament and to give effect to approved policies unfettered by Parliament. In turn, Parliament has unlimited power to call for information, to discuss, to scrutinise and to put the seal of popular approval on proposals made by the executive. The Cabinet governs while the role of the Parliament is to deliberate, discuss, legislate, advise, criticise and ventilate public grievances.<sup>147</sup>

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<sup>140</sup> Indian Constitution art 153.

<sup>141</sup> Indian Constitution art 163.

<sup>142</sup> Indian Constitution art 160.

<sup>143</sup> Indian Constitution art 200.

<sup>144</sup> Indian Constitution art 356.

<sup>145</sup> SC Kashyap, 'Executive-Legislature Interface in the Indian Polity' (2004) 10 *The Journal of Legislative Studies* 278, 280.

<sup>146</sup> Indian Constitution art 74.

<sup>147</sup> SC Kashyap, *Parliamentary Procedure, Law, Privileges, Practice & Precedents* (Universal Law Publishing Co, New Delhi 2000) Vol I, 81-2.

The Cabinet, being the political executive,<sup>148</sup> is responsible to Parliament. Though the Cabinet is drawn from the legislature, it has a separate and independent domain of its own with distinct status, powers and functions ordained by the constitution itself.<sup>149</sup> The two main functions of Parliament in the context of its relationship with the Cabinet are, firstly, to ensure that the government remains responsible to the House of the People,<sup>150</sup> and secondly, to exercise surveillance over the administration and secure its accountability to parliamentary institutions.

The Constitution provides only for the collective responsibility of the Cabinet.<sup>151</sup> If the ruling party or coalition<sup>152</sup> loses the confidence of the majority of the members of the house, its government has to resign.<sup>153</sup> The ministerial responsibility to the *lower house* of Parliament flows from India's written constitution and the rules of parliamentary procedure.<sup>154</sup> Likewise, the day-to-day administration is carried out by the administrative bodies that are accountable to Parliament. Though Parliament does not interfere with everyday administration, it does exercise surveillance and oversees the administration. Ministerial responsibility and administrative accountability are ensured through procedural devices like private members' bills, question hour, various kinds of motions, and committee scrutiny.<sup>155</sup> On an institutional level, another method of ensuring administrative accountability to Parliament is through various parliamentary committees.

With regard to the administration of states, the Chief Minister, the Cabinet and the state administrative bodies are accountable to the State Legislature. In this way, it simulates the practice of the union government.

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<sup>148</sup> People elect the legislature which forms the Cabinet. Individual Ministers are in charge of departments and assisted by Civil servants.

<sup>149</sup> Chapters 1 and 2 of Part V of the Indian Constitution clearly delineate the structures and powers of Union Executive and Parliament, respectively.

<sup>150</sup> Indian Constitution art 75, 114-116 and 265.

<sup>151</sup> Indian Constitution art 75(3).

<sup>152</sup> The first coalition government in independent India (1977-1979) collapsed due to internal differences. In 1989 a non-Congress coalition government fell after two years. From 1996 on, it is coalition rule in India.

<sup>153</sup> SC Kashyap, 'Executive-Legislature Interface in the Indian Polity' (2004) 10 *The Journal of Legislative Studies* 278, 282.

<sup>154</sup> *Ibid.*

<sup>155</sup> SL Shakti, *Glimpses of the Working of Parliament* (Metropolitan, New Delhi 1977) 186-87.



### 2.4.3. Place of Judiciary in the Constitution

This sub-section examines the key concepts governing the position, role and powers of the Indian Judiciary which includes the Supreme Court, the High Courts in the states and the lower judiciary. It also further analyses the relationship between the executive and the judiciary.

#### 2.4.3.1. Structure and powers of the Supreme Court

The Supreme Court of India interprets and enforces the world's lengthiest, most complex constitution, with more than 444 articles with multiple schedules, numerous lists, and ninety-two amendments.<sup>156</sup> It sits at the apex of a judicial system that serves the world's most populous democracy, a nation with more than one thousand one hundred million people.<sup>157</sup>

With reference to its powers, the Supreme Court has original and exclusive jurisdiction in any dispute (a) between the Union Government and one or more states; or (b) between the Union Government and any state or states on one side and one or more other states on the other side or between two or more states.<sup>158</sup> It has a wide appellate jurisdiction in constitutional, civil, criminal and other matters.<sup>159</sup> Normally a decision of the High Court is only appealed when the High Court certifies that the case satisfies the conditions prescribed for appeal in the Constitution.<sup>160</sup> But the Supreme Court enjoys further overriding discretion to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter made by any court or tribunal in the country.<sup>161</sup> Law declared by the Supreme Court is constitutionally binding in all the courts in India.<sup>162</sup>

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<sup>156</sup> Constitution of India <<http://www.answers.com/topic/constitution-of-india>> accessed 10 May 2006.

<sup>157</sup> As per 2001 Census, the population stood at 1028 million. <<http://www.censusindia.net/results/population.html>> accessed 24 March 2007. Recent surveys show that it has crossed 1100 million. <<https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>> accessed 15 August 2007.

<sup>158</sup> Indian Constitution art 131.

<sup>159</sup> Indian Constitution art 132-136.

<sup>160</sup> Indian Constitution art 134A.

<sup>161</sup> Indian Constitution art 136.

<sup>162</sup> Indian Constitution art 141.

According to Article 137, the court itself is free to change its views by overruling its earlier decision in subsequent cases. From the 1980's onwards in its 'epistolary jurisdiction,' the court treated letters, and even newspaper articles, under Article 32 as petitions for the protection of Fundamental Rights.<sup>163</sup>

The Indian Constitution established the Supreme Court of India as the custodian of Fundamental Rights to bring about the changes which the framers of the Constitution envisaged. In order to create a nation based on values consisting of equality, secularism and democracy, a powerful, independent judiciary was essential, and this was a paramount concern of the framers. Rudolph defines the Indian Constitution as a hybrid system that joins the Parliamentary sovereignty of the British model with the judicial review of the US model.<sup>164</sup> The Supreme Court jurisdiction is reinforced by an explicit grant of power under Article 13, to invalidate any law that contravenes any specified Fundamental Right in part III of the Constitution. Another important power of the Supreme Court is its original jurisdiction to issue writs in defence of these fundamental rights.<sup>165</sup>

Since the Indian system does not emphasise an equal separation of powers to the same extent as the US model, the Indian Supreme Court was not always successful in exerting its authority. The government of Indira Gandhi declared a state of emergency<sup>166</sup> in 1975, alleging that the internal security of the nation was under threat.<sup>167</sup> When the state of emergency was declared, access to the courts was suspended and freedom of speech and

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<sup>163</sup> *Mumbai Kamgar Sabha v Abdul Bhai Faizal Bhai* 1976 (3) SCC 832; *Sunil Batra v Delhi Administration* 1980 (3) SCC 488; *Upendra baxi v State of Uttar Pradesh* 1983 (2) SCC 308; *Khetri v State of Bihar* AIR 1981 SC 928 (Known as *Bhagalpur Under Trial Blinding Case*); *SP Gupta v Union of India* 1981 Supp SCC 87; *Sudipt Majumdar v State of Madhya Pradesh* 1983 2 SCC 258; *Bandhu Mukti Morcha v State of Haryana* AIR 1984 SCC 802; and *MC Mehta v Union of India* AIR 1996 SC 1977.

<sup>164</sup> LI Rudolph and SH Rudolph, 'Redoing the Constitutional Design: From an Interventionist to a Regulatory State' in A Kohli (ed), *The Success of India's Democracy* (CUP, Cambridge 2001) 132.

<sup>165</sup> Indian Constitution art 32: Remedies for enforcement of rights conferred by this Part III: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or Writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III.

<sup>166</sup> See n 106, below.

<sup>167</sup> Venkat Iyer, *States of Emergency* (Butterworths, New Delhi 2000) 152-60.

press was extinguished.<sup>168</sup> The Supreme Court was unwilling to oppose these measures. In 1976, the 42nd Amendment declared that the Supreme Court has no power to invalidate any parliamentary acts that were intended to further any of the Constitution's Directive Principles defined in Part IV of the Constitution.<sup>169</sup>

After lifting the state of emergency in 1977, the court realised its failure to uphold the fundamental rights, and asserted its supremacy over Parliament in subsequent cases.<sup>170</sup> In a decisive step, some provisions of the 42nd Amendment were struck down by the Supreme Court in the *Minerva Mills* case<sup>171</sup> in which the Supreme Court emphasised the importance of judicial review. With this case, the survival of judicial review, particularly in relation to government action affecting fundamental rights, was confirmed.

A significant factor is the 'equality' provisions.<sup>172</sup> Inspired by the 14th Amendment to the US Constitution, Article 15 of the Indian Constitution states that 'the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any one of them'.<sup>173</sup> These provisions are aimed at eradicating inequalities in Indian social life.<sup>174</sup> The framers of the constitution, therefore, saw the caste system as the main impediment to achieving equality. Consequently, union and state governments introduced a reservation policy for the Backward Castes,<sup>175</sup> the Scheduled Castes and Scheduled

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<sup>168</sup> B Neuborne, 'Constitutional Court Profile: The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 478, 488-92.

<sup>169</sup> Constitution (Forty-Second) Amendment Act of the Indian Parliament, 18 December 1976.

<sup>170</sup> *Minerva Mills v Union of India* AIR 1980 SC 1789; *Waman Rao v Union of India* AIR 1981 SC 271; *Srinivasa v State of Karnataka* AIR 1987 SC 1518.

<sup>171</sup> *Minerva Mills v Union of India* AIR 1980 SC 1789. In this case, the Supreme Court held that the amendment was a violation of the basic structure doctrine as it sought to insulate statutes from judicial review, and that constitutional amendments affecting the basic structure of the constitution may not be placed beyond judicial review.

<sup>172</sup> Indian Constitution art 14 and 15.

<sup>173</sup> SP Sathe, *Judicial Activism in India* (OUP, New Delhi 2002) 165.

<sup>174</sup> *Ibid.* India had a long history of social discrimination emanating from the Hindu caste system, affecting both employment and educational opportunities. Hence, providing equal protection alone is insufficient. Affirmative action on the side of the state is essential to weed out the past vestiges of inequality.

How even after sixty years of independence, India is far behind in achieving this goal, see National, 'NDTV Poll: Icons from Mahatma Gandhi to Sachin' *The Hindu* (New Delhi 12 August 2007) <<http://www.hindu.com/2007/08/12/stories/2007081255671200.htm>> accessed 13 August 2007.

<sup>175</sup> Backward castes fall between upper (forward) and lower or schedule castes. Other Backward Classes (OBCs) refer to castes officially recognized as having been traditionally subjected to marginalisation.

Tribes.<sup>176</sup> Reservation policy came to the fore during the Babri Masjid/Ram temple dispute when upper caste leaders objected to the implementation of the *Mandal* Commission report<sup>177</sup> by the V.P. Singh Government.

#### **2.4.3.2. Structure and Powers of High Courts**

The Indian judicial structure is materially the same as that left by the British. It is a hierarchical system with the Supreme Court at the top. The immediate successive rung is the High Courts, one for each state. At the state level, the High Court is the highest forum of appeal and revision for both civil and criminal matters. The High Courts, like the Supreme Court, are vested with extra-ordinary original jurisdiction through prerogative writs for enforcement of rights given to individuals under the constitution and the laws.

Under the Government of India Act, 1935, the constitution and organisation of the High Courts was vested in the provincial legislature while in the Indian constitution the subject and organisation of the High Courts was included in entry 78 of the union list. This change in the constitution had the objective of uniformity in the formation and organisation of all the High Courts in India. This suggests that in the Constitution, the High Courts occupy a very important position.

Certain jurisdiction and powers considered vital for rule of law were conferred on the High Courts by the constitutional provisions. These powers include, power to punish for contempt of itself,<sup>178</sup> the Writ jurisdiction which entrusts power to issue writs or orders for enforcement of Fundamental Rights and legal rights,<sup>179</sup> supervisory jurisdiction over subordinate courts and tribunals in the concerned state,<sup>180</sup> power to withdraw cases involving interpretation of constitution from the subordinate courts,<sup>181</sup> administrative

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<sup>176</sup> Indian Constitution art 342(1).

<sup>177</sup> For an analytical study of the *Mandal* report, M Desai, 'A Justification of Reservations and Affirmative Action for Backward Castes in India' (1991) 11 South Asia Bulletin 110-30.

<sup>178</sup> Indian Constitution art 215.

<sup>179</sup> Indian Constitution art 226.

<sup>180</sup> Indian Constitution art 227.

<sup>181</sup> Indian Constitution art 228.

control over the staff of the High Court<sup>182</sup> and general power to regulate the subordinate judiciary.<sup>183</sup>

Since most of the Indian states are linguistically established, High Courts play a vital role in administering justice at the state level. Distance and ignorance both of English and Hindi, keep the poor away from the Supreme Court. Hence, High Courts are vital within the Indian judicial structure, as is their supervisory jurisdiction over subordinate courts as these courts are prone to bias and pressure.

#### **2.4.3.3. Structure and powers of lower courts**

Since the lowest rung of the judiciary plays a crucial role in delivering justice on a daily basis to the common man, the Supreme Court observed in the Chandra Mohan case that the interests of the lower court must be given superiority in the dispensation of justice.<sup>184</sup> This places an enormous responsibility on the lower courts to deliver a fair, unbiased judgement. The lower courts are divided in their dealings between civil and criminal matters. Each state has the power to constitute and organise its own judicial structure but there is a similar three tiered set up in all the states,<sup>185</sup> apart from the city civil courts.<sup>186</sup>

On the civil side, the District Court, the top of the hierarchy of lower courts, exercises original and/or appellate jurisdiction. Immediately below the District court, is the Civil Judges' Court which has original or appellate jurisdiction and the lowest in the hierarchy is the Court of Munshiffs which have only original jurisdiction. As far as the civil appellate jurisdiction is concerned, the first appeal goes to the prescribed court<sup>187</sup> both on question of

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<sup>182</sup> Indian Constitution art 229.

<sup>183</sup> Indian Constitution art 233-235.

<sup>184</sup> *Chandra Mohan v State of Uttar Pradesh* AIR 1966 SC 1987.

<sup>185</sup> RM Jois, *Legal and Constitutional History of India* (NM Tripathi, Bombay 1984) Vol II, 236.

<sup>186</sup> In several Metropolitan cities having due regard to its special requirements, City Civil Courts are constituted under special enactments by the appropriate State Legislatures, to try all civil cases except those falling within the jurisdiction of the court of Small Causes. Appeals from decisions of City Civil Courts to the High Court, thereby avoid one appeal.

<sup>187</sup> Code of Civil Procedure 1908 (Act No 5 of 1908) s 96.

fact and law. When the first appeal is to a court lower than the High Court, a second appeal goes to the High Court<sup>188</sup> only on a question of law.

With regard to the criminal courts, the Code of Criminal Procedure (CrPC) 1973<sup>189</sup> Section 6<sup>190</sup> provides for the establishment of various grades of criminal courts, which includes Courts of Session, Judicial Magistrates of the first class and second class and Executive Magistrates<sup>191</sup>. Any appeal against an order of conviction from the Magistrate Court follows the legal process of going firstly to the Sessions Court, then the High Court and finally to the Supreme Court.<sup>192</sup> An appeal against an order of conviction based on a plea of guilt<sup>193</sup> and appeals against orders in petty cases<sup>194</sup> are barred. The state is empowered to prefer an appeal against inadequacy of sentence<sup>195</sup> and against an order of acquittal.<sup>196</sup>

However, it is important to note that Section 397 of CrPC confers power on the High Court and Sessions Court to call for and examine the correctness, legality or propriety of any finding, sentence or order made by any court subordinate thereto and to pass appropriate orders. This provision is vital to remedy any miscarriage of justice by lower courts, something which was not done in the Ayodhya dispute.

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<sup>188</sup> Ibid s 100.

<sup>189</sup> Code of Criminal Procedure 1973 (Act No 2 of 1974) (CrPC).

<sup>190</sup> CrPC (n 188) s 6: Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every state, the following classes of criminal courts, namely: i) Courts of Session, ii) Judicial Magistrates of the first class and in any Metropolitan areas Metropolitan Magistrates, iii) Judicial magistrates of the second class, and iv) Executive Magistrates.

<sup>191</sup> An Executive Magistrate is an officer of the Executive branch (as opposed to the judicial branch) who is invested with specific powers under both the CrPC and the Indian Penal Code (IPC). The Executive Magistrates alone are authorized to use force against people. They can direct the police about the manner of force (baton charge/ tear gas/blank fire/ firing) and also how much force should be used. They can also take the assistance of the Armed Forces to quell a riot.

<sup>192</sup> CrPC (n 188) s 374 provides that 'an appeal goes to the Supreme Court against an order of conviction made by the High Court and against an order of conviction made by the Court of Session to the High Court, and made by a Magistrate to the Court of Session'.

<sup>193</sup> Ibid s 375.

<sup>194</sup> Ibid s 376.

<sup>195</sup> Ibid s 377.

<sup>196</sup> Ibid s 378.

#### 2.4.3.4. Limitations encountered by the judiciary

The role of the independent judiciary is to deliver justice and to establish the rule of law. However, the legal system has certain inherent limitations. They need to be mentioned to comprehend the Ayodhya dispute.

Firstly, Indian society in general and the legal system in particular, seems to be dominated by caste considerations.<sup>197</sup> It can be elaborated by reviewing the history of the courts and judges. Statistics show that judges serving at the Supreme Court as well as High Courts often belonged to the upper castes. Lower castes and minorities were not adequately represented.<sup>198</sup>

Secondly, in a multi-religious country like India, upholding secularism and protecting minority rights are the responsibility of an independent and impartial judiciary. But recent court judgements<sup>199</sup> seem to favour Hindu militant organisations which threaten secular principles. For instance, by defining *Hindutva* as a Hindu way of life, the courts have endorsed the views of the *Sangh Parivar*<sup>200</sup> which advocates India as a Hindu state. In the *Manohar Joshi case*,<sup>201</sup> the Supreme Court found several of the accused, including the *Siva Sena*<sup>202</sup> leader, *Bal Thackeray*, one of the militant anti-Muslim voices within the Hindu militant groups in India, responsible for both promoting religious enmity and hatred by appealing to religion to gain votes. However, the Court held that '*Hindutva*', the ideological linchpin of Hindu militant groups, simply represented 'a way of life in the sub-continent'

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<sup>197</sup> BV Rao, *Crisis in Indian Judiciary* (Legal Aid Centre, Hyderabad 2001) 153-54.

<sup>198</sup> B Neuborne, 'Constitutional Court Profile: The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 478, 482-3. He proves this by pointing out that as of 2001, 136 judges had served as justices of the Supreme Court: 115 Hindus (24 identified as Brahmins, with only two from scheduled castes), 13 Muslims, 4 Christians, 2 Sikhs and 2 Parsis. Two have been women. No member of a Scheduled Caste or Tribe sat on the Supreme Court until 2000.

<sup>199</sup> *Manohar Joshi v Nithin Bhaurao Patil* AIR 1996 SC 796 and eleven other cases are collectively known as 'Hindutva cases'. In these cases, the Supreme Court pronounced judgement on 11 December 1995. The judgement included the definition of '*Hindutva*'.

<sup>200</sup> *Sangh* means organizations and *Parivar* means family. *Sangh Parivar* means 'Family of Hindu Nationalist Organizations' which is an umbrella organization of Hindu militant groups.

<sup>201</sup> *Manohar Joshi v Nitin Bhaurao Patil* AIR 1996 SC 796.

<sup>202</sup> *Siva Sena* is a Hindu militant organization and a political party headed by Bal Thackeray. Its main base is the State of Maharashtra which includes Mumbai, the economic capital of India.

and was not a violation of the Representation of the People Act, 1951. This judgement was acclaimed by the *Sangh Parivar* as a victory to their vision of *Hindutva*.<sup>203</sup>

Thirdly, as seen earlier, using English and Hindi languages as the medium in the Supreme Court and in the High Courts stands as an obstacle for the vast majority of uneducated people. Rakshit observed that 'often the law does not seem to be Indian in spirit, form, content and even in language'.<sup>204</sup> Even in lower courts, though the vernacular is allowed, English dominates in the arguments and court proceedings. The clients become mute spectators. The lack of legal knowledge of the ordinary people discourages the instigation of court proceedings, and many lawyers have the tendency to misuse the poor, illiterate litigants.<sup>205</sup> Delays, cases pending, worthless decisions and allegations of corruption all serve to damage their credibility.<sup>206</sup>

Fourthly, the tendency of those in power is to use the judicial process to settle political issues. The people in power as well as those who are in opposition bring issues to courts that belong to the political domain. This poses serious threat to judicial independence. From the interview, it became clear that there is a trend to pass on purely executive decision making functions to the judiciary.<sup>207</sup> It has become convenient for the executive to refer all politically controversial issues to the Supreme Court under Article 143 of the Constitution. For instance, the Ayodhya Dispute was sent to the courts asking them to adjudicate on grounds whether the Ram temple existed before 1528.<sup>208</sup>

Fifthly, the failure of the Executive in providing adequate facilities and funds has led to a lack of judges, which has resulted in cases piling up in the courts, which in turn, has

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<sup>203</sup> B Cossman and R Kapur, *Secularism's Last Sigh?: Hindutva and the (Mis)Rule of Law* (OUP, New Delhi 1999) 26-52.

<sup>204</sup> B Rakshit, 'Right to Constitutional Remedy: Significance of Article 32' (21-28 August 1999) XXXIV *Economic and Political Weekly* 2381-2383.

<sup>205</sup> R Moog, 'The Significance of Lower Courts in the Judicial process' in Veena Das (ed), *The Oxford India Companion to Sociology and Social Anthropology* (OUP, New Delhi 2003) 1393.

<sup>206</sup> Interview with lawyers, People's Watch-Human Rights Organization, Madurai (India 14 July 2007).

<sup>207</sup> Interview with Arul Raj, Retired Judge of the City Civil Court of Chennai (India 4 February 2006).

<sup>208</sup> M Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (PIOOM and CIJL, Leiden 1998) 99.



provoked frustration amongst litigants, lawyers and judges.<sup>209</sup> The number of unresolved court cases has grown since 1950 and now stands at over thirty million cases.<sup>210</sup> In 1971 itself, the Indian Law Commission pointed out that nearly thirty-six percent of cases available for disposal during a year remained unresolved; the slow movement caused an accumulation of arrears, causing further delay, producing a snowball effect.<sup>211</sup>

The final limitation concerns the implementation of the judgements. The Constitution obliges civil and judicial authorities to act in aid of the Supreme Court.<sup>212</sup> It may award exemplary costs against any defaulting Government.<sup>213</sup> Similarly, the orders of the High Court and lower judiciary have to be implemented by the state executives and administrative authorities. In reality, they act only to oblige the political party in power.<sup>214</sup> Needless to say, the judicial authority is threatened, weakening further any democracy and the rule of law in the country.

#### **2.4.4. Indian State and religious communities**

This sub-section analyses the secular nature of the Indian state which includes equal protection to all religions, the constitutional guarantees for the religious communities and the provisions of criminal law protecting religious places and worship.

##### **2.4.4.1. Secularism and the Indian Constitution**

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<sup>209</sup> KN Singh in 'The Obstacles to the Independence of the Judiciary' in *The Independence of the Judiciary in India* (Seminar Report, New Delhi 1990) 25-26, criticizes the inertia of the Executive and Parliament for solving the plagues which haunt the judiciary. He came heavily on them for taking no step for several years to fill even the existing vacancies of judges which has resulted in huge arrears.

<sup>210</sup> Ibid 26. Singh pointed out that there were 97,943 cases pending before the courts of the Chief and Additional Chief Metropolitan Magistrates and 235,033 cases pending before other magistrates.

<sup>211</sup> B Rakshit, 'Right to Constitutional Remedy: Significance of Article 32' (21-28 August 1999) XXXIV *Economic and Political Weekly* 2381, 2382.

<sup>212</sup> Indian Constitution art 144.

<sup>213</sup> *Dinesh v Motilal Nehru Medical College* (1990) 4 SCC 627.

<sup>214</sup> Human Rights Watch, 'We Have No Orders to Save You': State Participation and Complicity in Communal Violence in Gujarat' in John Dayal (ed), *Gujarat 2002: Untold and Re-Told Stories of the Hindutva Lab* (Media House, Delhi 2003) Vol I, 350-52. Mohit Bhattacharya, 'Bureaucracy and Politics in India' in B Chakrabarty and M Bhattacharya (eds), *Public Administration: A Reader* (OUP, New Delhi 2003) 327. Bhattacharya states that 'in reality, far from being, neutral and rule-bound, bureaucracy bends the rules with alacrity to serve the 'vested interests', which is a way of serving its own interests.

Secularism, a ‘basic structure’<sup>215</sup> in the Indian Constitution, defines no separation between religion and state, but rather commands an equal treatment of all religions, with the state not identifying with or submitting to any particular religion. Further, no discrimination between members of different religious communities shall be carried out by the state. Particularly, constitutional secularism provides every citizen with equal rights to enter any office under the state.<sup>216</sup> This may be seen as an attempt to ameliorate traditional sources of conflicts and discrimination. It establishes a constitutional scheme to protect minority interests.

Since secularism gives equal protection to all religions, it also covers religious freedom. It may be argued that the Constitution is underpinned by an ethos of secularism. Jacobsohn uses the term “ameliorative secularism” to describe the paradigm of the Indian Constitution. He believes ‘it seeks to mitigate the social condition of people long burdened by the inequities of religiously based hierarchies’.<sup>217</sup> Beteille observes that affirmative or positive discrimination has been written into the Indian Constitution itself as it focuses not only on equality as a right available to all citizens, but puts its stress on ‘equality as a policy aimed at changing the structure of the society’.<sup>218</sup>

Indian secularism is not anti-god or anti-religion. It means equal respect for all faiths<sup>219</sup> implying exercise of religious freedom and tolerance, and the rejection of discrimination based on religious belief. Hence, any communal conflict is considered as an attack on the secular ethos of the Indian state and its democratic values.

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<sup>215</sup> *SR Bommai v Union of India* AIR 1994 SC 1918.

<sup>216</sup> Indian Constitution art 16.

<sup>217</sup> GJ Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, Princeton 2003) 94.

<sup>218</sup> A Beteille, *Society and Politics in India: Essays in a Comparative Perspective* (Athlone, London 1991) 206-7.

<sup>219</sup> PB Gajendragadkar, *Secularism and the Constitution of India* (Bombay University, Bombay 1971) 53.

#### 2.4.4.2. Constitutional provisions on freedom of religion

Religious identity is central to the many hundreds of millions of Indian citizens.<sup>220</sup> The Constitution too guarantees religious freedom for approximately 830 million Hindus, and about 140 million Muslims, apart from the Christian, Sikh, and Parsi communities.<sup>221</sup> Since the research focuses on sacred sites as an important component of religious freedom, it is apt to review the protection of religious freedom under the Indian Constitution.

The framers of the Constitution were aware of the religious and economic inequalities in India. They aimed to promote equality by integrating specific provisions into the Constitution for all the groups. Fundamental Rights<sup>222</sup> and the Directive Principles of State Policy<sup>223</sup> are relevant in securing social justice and creating a unified country.<sup>224</sup>

The explicit prohibition of religious discrimination in the text of the Constitution expressed the seriousness of religious inequality at the time of independence.<sup>225</sup> Article 15 (1) of the Constitution provides that 'the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them,' while 15 (2) prohibits discrimination even by the private sector where this concerns public accommodation or funds provided by a state bursary. Besides, equal opportunity in all spheres of public employment is guaranteed.<sup>226</sup>

Article 17 specifically addresses the problem of untouchability, a practice commonly found in pre-independent India which is part of a religion-based caste system. It states that untouchability be abolished, and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance

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<sup>220</sup> AA Engineer, *Secularism in India – Part II* <<http://www.csss-islam.com/archive.php>> accessed 30 November 2006.

<sup>221</sup> Census of India 2001, 'Data on Religion' <<http://www.censusindia.net/religiondata/index.html>> accessed 18 October 2006.

<sup>222</sup> Part III of the Indian Constitution.

<sup>223</sup> Part IV of the Indian Constitution.

<sup>224</sup> PB Gajendragadkar, *The Constitution of India: Its Philosophy and Basic Postulates* (OUP, Oxford 1969)

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<sup>225</sup> RCS Sarkar, *The Constitution of India* (National, New Delhi 1991) 26.

<sup>226</sup> Indian Constitution art 16.

with law. Although the courts have taken steps to implement the provisions of the Constitution when religious belief interfered with the efforts to end untouchability,<sup>227</sup> crimes of such nature are reported every day.

Though Articles 15-17 have clear implications for the rights of members of minorities, the framers considered them insufficient to protect them. So, Articles 25- 30 were included to more specifically address the freedom of religion and rights of minorities.

Article 25<sup>228</sup> guarantees to every person freedom of conscience and the right to freely profess, practise, and propagate any religion. Article 26<sup>229</sup> flows from Article 25 and deals with the freedom of every religious denomination to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion.

Articles 25 and 26 can be described as the nucleus of the doctrine of religious freedom. Though the Constitution guarantees freedom of religion, the state can exercise its power within the restrictions imposed by the respective articles to carry on its secular activities.<sup>230</sup> While freedom of conscience is absolute, freedom of practice is subject to restrictions such as maintenance of public order, morality and health, and provisions guaranteeing other

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<sup>227</sup> *Shastri Yagnapurushdasji v Muldas Bhundaras Vaishya* AIR 1966 SC 1119.

<sup>228</sup> Indian Constitution art 25: that Freedom of conscience and free profession, practice and propagation of religion –

(1) Subject to public order, morality and health and to the other provisions of this Part (Part III – Fundamental Rights), all Persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law – (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of *Kirpans* shall be deemed to be included in the profession of the Sikh religion. Explanation II: In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

<sup>229</sup> Indian Constitution art 26: Freedom to manage religious affairs:- Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –

(a) to establish and maintain institutions for religious and charitable purpose;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

<sup>230</sup> RCS Sarkar, *The Constitution of India* (National, New Delhi 1991) 136.

basic rights.<sup>231</sup> In case of any conflict between religious rights and their restrictions, religion has to yield. It should be noted that in many cases,<sup>232</sup> the Supreme Court gives priority to public order over freedom of religion. These restrictions play a crucial role in shaping the practice of the religion. For instance, one cannot claim an absolute right to hold a religious gathering or a procession and such a right will have to be regulated by the state in the interest of maintaining public order. In addition, there cannot be any freedom of religion insofar as it encroaches on the exercise of other Fundamental Rights, such as the right to equality or the right to speech and expression or to the right to personal liberty.

The expressions 'religion' and 'matters of religion' used in Articles 25 and 26 have not been defined in the Constitution although several suits have sought to give a definition to these expressions. In one such case, the Supreme Court gave a wide meaning to the word 'religion' and held that a person has a right to practice and propagate not only matters of faith and belief but also rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion.<sup>233</sup> Therefore the state cannot interfere with any practice which is essentially religious.<sup>234</sup> This division is very difficult to apply in the Indian situation since religious and secular practices are so entwined in Hinduism and Islam. Religious practices are essential to one's faith, but in India, it is the courts who are the final arbiters of what constitutes essential practice.<sup>235</sup>

Article 27<sup>236</sup> provides that no person shall be compelled to pay taxes for the promotion or maintenance of any particular religion. Article 28 prohibits any religious instruction in state-owned educational institutions. However, although it is not totally prohibited in other educational institutions, no person can be compelled to participate without their consent.

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<sup>231</sup> SP Sathe, *Judicial Activism in India* (OUP, New Delhi 2002) 167.

<sup>232</sup> *Virendra v State of Punjab* AIR 1957 SC 896; *Dalbir v State of Punjab* AIR 1962 SC 1106; *Madhu Limaye v State of Punjab* AIR 1962 SC 1106.

<sup>233</sup> *Commissioner, Hindu Religious Endowment v Lakshmindra* 1954 SCR 1005; *Ratilal v State of Bombay* 1954 SCR 1005; *Durgah Committee v Muldas* AIR 1966 SC 1119, 1127.

<sup>234</sup> *Saifuddin v State of Bombay* AIR 1962 SC 853.

<sup>235</sup> *Quareshi v State of Bihar* 1959 SCR 629; *Mittal v Union of India* AIR 1983 SC 1.

<sup>236</sup> Indian Constitution art 27: Freedom as to payment of taxes for promotion of any particular religion: No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Articles 29 and 30 guarantee certain cultural and educational rights to not only religious minorities, but also the cultural and linguistic minorities.

These special provisions guaranteeing religious rights for minorities were disputed as they contradict the constitutional goal of secularism. Pylee observes that the framers decided that the meaning of secularism, as envisaged by the Constitution, did not separate religion from the state, rather the state provided enough protection which adds a sense of religious harmony.<sup>237</sup> Therefore, the Constitution has set out specific provisions which endeavour to make India a more equal and secular state, but it is the task of the Indian judiciary to apply those constitutional provisions.

#### **2.4.4.3. Criminal law and protection of sacred site**

The Indian Penal Code 1973 defines a range of crimes including those relating to matters of religion. Under the Constitution, criminal jurisdiction belongs concurrently to the union government and to the states. Existing laws on crime prevention and punishment are embodied in two principal statutes: the Indian Penal Code (IPC) of 1860 and CrPC of 1973. These statutes cannot be altered since they take precedence over state legislations. Constitutional guarantees of protection to the accused<sup>238</sup> were embodied in the CrPC.

Chapter XV of the Indian Penal Code explains the offences relating to religion.<sup>239</sup> These provisions define the scope, characteristics, and essence of these offences. According to the IPC section 295,<sup>240</sup> whoever destroys, damages or defiles any place of worship, with the intention of insulting any person or group, shall be punished under the law. Section 295A<sup>241</sup> states that whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizen of India, by words,<sup>242</sup> either spoken or written, or by signs,

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<sup>237</sup> MV Pylee, *India's Constitution* (Asia Publishing House, Bombay 1967) 120.

<sup>238</sup> Indian Constitution art 20 and 22.

<sup>239</sup> Indian Penal Code (Act No 45 of 1860) ss 295-98.

<sup>240</sup> IPC s 295: whoever destroys, damages or defiles any place of worship, with the intention of insulting any person or group, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons ... shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both'.

<sup>241</sup> Instituted by Act 25 of 1927 s 2.

<sup>242</sup> Substituted by Act 41 of 1961 s 3 for 'certain words'.

by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished.<sup>243</sup>

It is very important to establish that malice is one of the important factors of the offence under section 295A and it is necessary for the prosecution to establish that element by evidence. If a person with intent offends the religious faith of others, it would be difficult to hold that his/her act was done bona fide and without malice.<sup>244</sup> The malicious intention has to be ascertained primarily from the language used by the accused. The truth of the allegations cannot be an effective defence to a charge under this section.<sup>245</sup> Having regard to the ingredients of the offence created by section 295A, there cannot be any possibility of those laws being applied for a purpose not sanctioned by the Constitution.<sup>246</sup>

According to section 296, whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. According to section 297, whoever with the intention of wounding the feelings of any person, or of insulting the religion of any person, ... commits any trespass in any place of worship or on any place of sculpture, any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any person assembled for the performance of funeral ceremonies, shall be punished.

Section 298 states that whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished.

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<sup>243</sup> Substituted by Act 41 of 1961 s 3 for 'two years'.

<sup>244</sup> *In Re P Ramaswamy* (1962) 2 Criminal Law Journal 146 Madras.

<sup>245</sup> *State of Mysore v Henry Rodrigues* (1962) 2 Criminal Law Journal 564 Mysore.

<sup>246</sup> *Ranjit Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620 Criminal law Journal 1306.

The above analysis suggests that there are laws to guarantee the freedom of religion and for protecting sacred sites of religious communities. Moreover, union government and state governments are allowed to adopt new legislations if the situation warrants it.

## 2.5. Indian Social and Cultural Context

India enjoys a rich cultural diversity. The land of India spans an area of 3,287,263 square kilometres, which includes dry desert areas, evergreen forests, snowy Himalayas, and also a long coast, and fertile plains. The total population of India on 1 March 2001 stood at 1,027,015,247 comprising approximately one-sixth of the world's population. With this, India became only the second country in the world, after China, to cross the one billion mark.<sup>247</sup> This population is remarkably diverse, having more than two thousand ethnic groups. Almost 40 percent of Indians are younger than 15 years of age.<sup>248</sup> More than 70 percent of the people live in more than 550,000 villages, and the remainder in more than 200 towns and cities.<sup>249</sup>

The government has recognized 22 languages as official.<sup>250</sup> Hindi is the official language of the union<sup>251</sup> and the most widely spoken. India also has the third largest number of English speakers in the world next to the USA and the UK.<sup>252</sup> In India, the total literacy rate is estimated as 65.38 percent.<sup>253</sup>

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<sup>247</sup> Government of India, 'Provisional Population of India 2001'

<<http://www.censusindia.net/results/resultsmain.html>> accessed 20 November 2006.

<sup>248</sup> Government of India, 'India at a Glance: Broad Age Groups' <<http://www.censusindia.net/broad.html>> accessed 26 November 2006.

<sup>249</sup> Government of India, 'India at a Glance: Administrative Divisions' <<http://www.censusindia.net/broad.html>> accessed 26 November 2006.

<sup>250</sup> Eighth Schedule of the Indian Constitution contains the list of official languages. Until 1992, only 18 languages were recognized as official languages and through the Constitution (Ninety-second Amendment) Act 2003 four more languages were added in the list. <http://indiacode.nic.in/coiweb/amend/amend92.htm> accessed 24 November 2006.

<sup>251</sup> Indian Constitution art 343: The official language of the Union shall be Hindi in Devanagari script.

<sup>252</sup> Annika Hohenthal, 'English in India – and Who Speaks English to Whom and When' (Department of English, University of Turku, Finland) <<http://www.thecore.nus.edu.sg/post/india/hohenthal/5.2.html>> accessed 21 November 2006. See also, BB Kachru, *The Alchemy of English: The Spread, Functions and Models of Non-native Englishes* (English in the International Context Series, Pergamon Institute of English, Oxford 1986).

<sup>253</sup> Government of India, 'Census of India 2001: Number of Literates and Literary Rate by sex' <[http://www.censusindia.net/t\\_00\\_006.html](http://www.censusindia.net/t_00_006.html)> accessed 20 November 2006.



Every world religion is represented in India. Although 82 percent of the people are Hindus, India is also home to the third-largest Muslim population in the world (13.1%) behind Indonesia and Pakistan. India contains the majority of the world's Zoroastrians (0.01%) and other religious groups include Christians (2.3%), Sikhs (1.94%), Buddhists (0.76%), Jains (0.40%), Jews and Bahais.<sup>254</sup> Apart from these established religions, approximately 8% of the population is indigenous people<sup>255</sup> who have their own religious practices. These people, known as 'tribals', have their own gods, their own rituals and taboos. The tribals have a 'culture' and though they are not literate, they have a rich oral culture.<sup>256</sup>

Religion, caste, and language are major determinants of social and political organization in India today. Particularly, the caste system reflects Indian occupational and socio-religiously defined hierarchies. Despite economic modernization and laws countering discrimination against the lower end of the class structure, the caste system remains an important source of social identification for most Hindus and many non-Hindus as well. It is this extremely wide and often volatile diversity of culture within India which has created great difficulties in forging coherent values and traditions that could be defined in the law. This diversity has been blended into and is reflected by India's legal structure.<sup>257</sup>

Religious and cultural diversity in India underscores the relationships between various faith communities, and sacred sites are a key element of those relationships. The Ayodhya dispute is a sacred site issue based on the allegations of some militant Hindu organisations that the Muslims built Babri Masjid over what was formerly a temple of the Hindu god Ram. For the purpose of our case study, it is pertinent to understand the religious characteristics of Hinduism and Islam, the manner in which these religions established

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<sup>254</sup> Government of India, 'Census of India 2001: Data on Religion'

<<http://www.censusindia.net/religiondata/index.html>> accessed 20 November 2006.

<sup>255</sup> Government of India, 'India at a Glance: Scheduled Castes & Scheduled Tribes Population'

<<http://www.censusindia.net/scst.html>> accessed 21 November 2006.

<sup>256</sup> S Janah, *The Tribals of India: Through the Lens of Sunil Janah* (OUP, Calcutta 1993) 13. For a detailed study, see, Virginius Xaxa, 'Tribes in India' in Veena Das (ed), *The Oxford India Companion to Sociology and Social Anthropology* (OUP, New Delhi 2003) 373-408.

<sup>257</sup> AM Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case' (2005) 24 Berkeley J Int'l L 218, 232.

sacred sites, and also their central beliefs, all of which will be analysed in the ensuing section.

### 2.5.1. Hinduism in India

The word 'Hinduism' in English was first used in 1829.<sup>258</sup> Hinduism denotes a complex religious tradition. It has evolved over thousands of years. Today it has more than 800 million adherents in India and several million in the Diaspora. Hinduism also stands for the civilization of the inhabitants of Hindustan which literally means the land surrounding the Indus River, referred to by the ancient Persians as Hindu.<sup>259</sup> Hinduism is a mosaic of many different beliefs and practices, values and morals, culminating in a way of life.<sup>260</sup> Although Hinduism is made up of a vast number of cults and sects, *Saivic*,<sup>261</sup> *Vaishnavite*<sup>262</sup> and *Sakthi*<sup>263</sup> worship are three prominent sects whose followers are found throughout India. It is an ethnic religion of a single cultural unit which does not try to attract converts from outside the unit.<sup>264</sup>

Hinduism does not conform to the idea of a religion in the western sense since it has no founder, nor is it prophetic. It is not governed by any particular creed or dogma, and the concept of one god is not central to it. There is no specific scripture or work regarded as being uniquely authoritative. Also, it is not sustained by any ecclesiastical organization.<sup>265</sup> However, from the beginning of the 20<sup>th</sup> century, the *Sangh Parivar* projects a monolithic religious version of Hinduism. Initially this idea was promoted by members of upper castes, the *Brahmin* community. Thapar names this *Brahminic* Hinduism as 'syndicated Hinduism'.<sup>266</sup> According to Gail Omvedt, the material base of the *Brahminic* Hinduism is

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<sup>258</sup> JS Hawley, 'Naming Hinduism' (Summer 1991) 15 The Wilson Quarterly 20, 22.

<sup>259</sup> H Elgood, *Hinduism and the Religious Arts* (Cassell, London 1999) 2.

<sup>260</sup> AR Choudhury, 'Hinduism' in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 62.

<sup>261</sup> *Shiva* is one of the three major gods of Hinduism. The followers of Shiva are known as *Saivic* sect.

<sup>262</sup> Another major god in Hinduism is Vishnu. The followers of Vishnu are known as *Vaishnava* sect.

<sup>263</sup> *Sakthi* is a major female goddess in Hinduism. The followers of Sakthi are known as *Saktha* sect.

<sup>264</sup> R Colledge, *Mastering World Religions*, (Macmillan, London 1999) 155.

<sup>265</sup> Ibid 156.

<sup>266</sup> Romila Thapar argues that the *Sangh Parivar* propagates 'syndicated Hinduism' and claims to be re-establishing the Hinduism of pre-modern times; in fact it is only re-establishing its *Brahminic* (upper caste dominance) system and in the process distorting the historical and cultural dimensions of indigenous religions

the caste structure of Indian society.<sup>267</sup> By maintaining the caste system, the *Sangh Parivar* attempts to construct Hinduism as a homogeneous religion. The evolution of nationalist Hinduism has mainly been defined in opposition to the Muslim ‘other’.<sup>268</sup> This will assist in understanding the confrontation between a section of Hindus and the Muslims in the Ayodhya dispute.

To provide a positivist, legal answer to ‘who is a Hindu’, the Indian Constitution states ‘the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain, or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly’.<sup>269</sup> Baird claims that this explanation is a constitutional admission of two things. Firstly, it admits that there is a difference between the “Hindu religion” and “Hindu” as a legal category. Secondly, it suggests that the Sikh, Buddhist, or Jain are distinguishable from “Hinduism” as a religion, but that before the law they are to be embraced within the category of “Hindu”.<sup>270</sup> There was no self-evident and universally acceptable answer but only multiple and overlapping ones.<sup>271</sup>

Hindu Acts, such as the Hindu Succession Act of 1956, the Hindu Marriage Act,<sup>272</sup> the Hindu Adoptions and Maintenance Act,<sup>273</sup> and the Hindu Minority and Guardianship Act<sup>274</sup> use almost identical language. These Acts make it clear that the term ‘Hindu’ means that one could be an atheist, reject caste laws, reject the Vedas (Sacred Books of most of the Hindus), renounce Hinduism as a religion and still be considered a ‘Hindu’ for legal

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and divesting them of the nuances and variety which was a major source of their enrichment. See, R Thapar, *Cultural pasts: Essays in Early Indian History* (OUP, New Delhi 2000).

<sup>267</sup> Gail Omvedt, *Dalit Visions* (Tract for the times 8, Orient Longman, New Delhi 1995) 7-12.

<sup>268</sup> Ram Puniyani, *Hindu Extreme Right-Wing Groups: Ideology & Consequences* (Media House, Delhi 2004) 23.

<sup>269</sup> Explanation II of Article 25 [2] [b] in the Indian Constitution.

<sup>270</sup> RD Baird, ‘On Defining ‘Hinduism’ as a Religious and Legal Category’ in RD Baird (ed), *Religion and Law in Independent India* (Manohar, New Delhi 1993) 41-2.

<sup>271</sup> A Vanaik, *Communalism Contested: Religion, Modernity and Secularism* (Vistaar, Delhi 1997) 150.

<sup>272</sup> Hindu Marriage Act of 1955 [Act No 25, dated 18 May 1955] s 2.

<sup>273</sup> Hindu Adoptions and Maintenance Act of 1956 [Act No 78, dated 21 December 1956] s 2.

<sup>274</sup> Hindu Minority and Guardianship Act of 1956 [Act No 32, dated 25 August 1956] s 3.

purposes.<sup>275</sup> According to Tahir Mahmood, 'Hindu law is not the law of Hindus. Hindus are only one of those communities governed by this law'.<sup>276</sup>

From the above presentation, one can understand that 'Hinduism' is an umbrella term which refers to various sects, beliefs and practices of the Indian subcontinent, and that this pluralism is recognised by the Indian legal system itself.

### 2.5.1.1. History and Characteristics of Hinduism

As far as Hinduism is concerned, the popular belief among Hindus is that it has no origin and it was there from the beginning of the world. The ten centuries from about 500 BC to 500 AD are the period of classical Hinduism called the *Epic period*. Two great epics, the *Ramayana*<sup>277</sup> and *Mahabharatha*<sup>278</sup> are rich encyclopaedic sources of this period. During this period the *Dharma Shastras*,<sup>279</sup> which define the structure of Hindu society and how Hindus should live within that structure were codified. However, the essential concept was *Varnashrama Dharma*<sup>280</sup> that interprets the four castes of society. This period also gave rise to new forms of worship, often performed in front of an image in a temple.<sup>281</sup>

Two gods, *Vishnu* and *Shiva* became pre-eminent during this period although many other gods were also worshipped. In North India, *Vishnu* emerged as a benevolent god, who periodically descends to the world in various forms to restore righteousness and there are believed to be ten such incarnations. The most important incarnations in terms of devotion are *Krishna* and *Rama*. According to the Hindu belief, Rama, a prince, ruled Ayodhya, restored righteousness to the earth by destroying the king *Ravana*<sup>282</sup> who had abducted his

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<sup>275</sup> RD Baird, 'On Defining "Hinduism" as a Religious and Legal Category' in RD Baird (ed), *Religion and Law in Independent India* (Manohar, New Delhi 1993) 41-2.

<sup>276</sup> T Mahmood, *Studies in Hindu law* (2<sup>nd</sup> edn Law Book Co, Allahabad 1986) xlii; JDM Derrett, *Introduction to Modern Hindu Law* (OUP, Bombay 1963) 18-21.

<sup>277</sup> *Ramayana* narrates about Hindu god Ram and his rule in Ayodhya.

<sup>278</sup> *Mahabharatha* narrates the war between *Gauravas* and *Pandavas* and Lord *Krishna*'s role in the war.

<sup>279</sup> *Dharma Shashtra* is the "science of dharma" and is a set of texts which teach the eternal immutable dharma found in the Vedas. Dharma means 'the principle of law that orders the universe'. <<http://philtar.ucsm.ac.uk/encyclopedia/hindu/ascetic/dharma.html>> accessed 20 November 2006.

<sup>280</sup> *Varnashrama Dharma* explains the four castes in Indian society.

<sup>281</sup> H Elgood, *Hinduism and the Religious Arts* (Cassell, London 1999) 5-8

<sup>282</sup> *Ravana*, a king, ruled Sri Lanka according to the epic *Ramayana*.

wife *Sita*.<sup>283</sup> Devotion to *Rama* found powerful expression in the *Ramacarithamanas* of Tulsidas<sup>284</sup> and the cult of *Rama* became popular in North India from the eighteenth century, especially in the state of Uttar Pradesh.<sup>285</sup>

There is an abundance of beliefs and teachings in Hinduism but only four major beliefs, *Samsara*,<sup>286</sup> *Karma*,<sup>287</sup> *Dharma*<sup>288</sup> and *Varunadharma*,<sup>289</sup> command universal acceptance.<sup>290</sup> Although Hindus believe in thirty-three million deities, belief in *Brahman*, the Supreme Being, or Absolute One, is also found among many.<sup>291</sup> Hindus essentially believe in rebirth and the *Law of Karma*, which refers to a system of cause and effect that may span several lifetimes.<sup>292</sup>

#### 2.5.1.2. Worship in temples and establishing *Tirtha*<sup>293</sup>

For the Hindus, India is a sacred land. Places that are considered sacred are often closely associated with religious worship. Sacred sites, which abound in Hindu India, are not necessarily confined to religious buildings alone, but can also be discovered in the context of worship of the nature of the ancient Hindu.<sup>294</sup> Most of the prominent sacred sites are associated with legends and myths. For example, Ayodhya is considered by Hindus as the birthplace of Ram, who is believed to be an incarnation of the god Vishnu<sup>295</sup>.

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<sup>283</sup> *Sita* is wife of Rama.

<sup>284</sup> Tulsidas wrote *Ramacarithamanas*, story about Rama and his rule, in the sixteenth century.

<sup>285</sup> Uttar Pradesh is a North Indian State where Ayodhya is situated.

<sup>286</sup> *Samsara* means the cycle of birth and rebirth.

<sup>287</sup> *Karma* means action; the law of causation applied to the moral realm showing that all actions have inevitable moral consequences in this life or the next.

<sup>288</sup> *Dharma* means righteousness, duty, law; the path which a man should follow on accordance with his nature and his station in life; one of the four ends of man.

<sup>289</sup> *Varunadharma* means the duties and obligations of the four social orders; also used in the sense of the body of rules governing the caste system.

<sup>290</sup> DS Sharma, 'The Nature and History of Hinduism' in KW Morgan, (ed), *The Religion of the Hindus* (The Ronald Press Company, New York 1953) 13-23.

<sup>291</sup> S Weightman, 'Hinduism' in JR Hinnells, (ed), *The New Penguin Handbook of Living Religions* (Penguin Books, London 1997) 283. Weightman observes that Hindus see this *Brahman* in their favourite gods which may include people of great sanctity, in animals such as the cow, in certain trees, rivers and mountains, and in countless sacred sites.

<sup>292</sup> V Narayanan, *Understanding Hinduism* (Duncan Baird, London 2004) 67-91.

<sup>293</sup> *Tirtha* literally means 'ford or place of crossing'. Here it is used in the sense of place of pilgrimage which is conceived by the Hindus as a place of crossing from this birth to another birth.

<sup>294</sup> AR Choudhury, 'Hinduism' in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 62.

<sup>295</sup> See n 262, below.

Temples play a pivotal role because they perform a vital socio-religious purpose within Hindu society. Temples are built at sacred places to gain the full benefit of resident auspicious deities. When the temple is completed and consecrated, the potential sacredness of the site manifests itself.<sup>296</sup>

The Hindu term for a temple is '*Mandir*' which literally means 'an abode', 'a dwelling place' wherein the deity resides. A temple is a place where devotees come to pay their homage to the deity at his/her home at any time of the day they wish.<sup>297</sup> For the Hindus, there are four important centres of worship. They are home-shrines, roadside shrines, big temples and places of pilgrimage. Though worship in temples is a widely known and accepted practice, it is wholly optional. Hindus do not need to go to temples because the home-shrine is considered the most sacred site for a Hindu family.<sup>298</sup>

Bhardwaj observes that Hindu sacred sites are not the focal points for the 'propagation' of religious ideas, per se, because they are purely sacred foci without being organisational centres.<sup>299</sup> The Hindu temples have a public purpose too. Asserting the public nature of the temples, justices in the Supreme Court of India stated that the participation of the members of the public in the *Darshan*<sup>300</sup> in the temple, and in the daily acts of worship, or in the elaborations of festival occasions may be a very important factor to consider in determining the character of the temple.<sup>301</sup> When a dispute arose as to whether a temple was public or private in nature, the court concluded that the institution in the suit will be a temple if two conditions are satisfied. The first condition is that it is a place of public religious worship and the other is that it is dedicated to, or is for the benefit of, or is used as of right by, the Hindu community, or any section thereof, as a place of religious worship.<sup>302</sup>

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<sup>296</sup> G Michael, *The Hindu Temple: An Introduction to its Meaning and Forms* (Harper & Row, New York 1977) 68.

<sup>297</sup> AR Choudhury 'Hinduism' in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 77.

<sup>298</sup> Ibid 84-5.

<sup>299</sup> SM Bhardwaj, *Hindu Places of Pilgrimage in India* (University of California Press, London 1983) 201.

<sup>300</sup> *Darshan* is the act of seeing the enshrined deity in the temple or in front of any sacred image.

<sup>301</sup> *Shri Govindlalji and Others v State of Rajasthan* AIR 1963 SC 1638.

<sup>302</sup> *PF Sadavarthy v Commissioner of H R & C E* 1963, SC 510.

As regards the place of pilgrimage or *tirtha*, the sacred sites are seen as a “port of transit”, a place from where human beings may “cross over” the ocean of life and death.<sup>303</sup> In fact, many temples and sacred sites are also located near the sea, a lake, a river, or a spring. For instance, Ayodhya is situated on the banks of the river *Sarayu*.<sup>304</sup> In Hinduism, pilgrimage is not a basic duty but it is an optional practice which is exercised by many Hindus,<sup>305</sup> explaining why there are many pilgrim centres all over India. So, pilgrimages, together with the ceremonial bathing in sacred rivers or temple tanks are considered symbolic of the individual soul’s pilgrimage to the Supreme One and of its purification from all sins.<sup>306</sup> It is realisation of the sanctity of a place that motivates the building of a temple, which becomes the focus of religious activities, and also a meeting place for devotees. In its turn the temple helps to attract pilgrims from far and wide, making the region into a thriving *tirtha*.<sup>307</sup> From the beginning of the eighteenth century, Ayodhya became an important pilgrim centre.<sup>308</sup>

### 2.5.1.3. Growth of Hindu communalism

To understand the Ayodhya dispute, it is essential to know about the Hindu communal organisations in India. From the beginning of the 1980s, one can see the rise of *Hindutva*<sup>309</sup> movements urging India to be the land of the Hindus. The construction of *Hindutva* is to be seen against the backdrop of the emergence of Hinduism as a homogenous religion at the end of the nineteenth century. Multiple religious revivalist movements ranging from the *Arya Samaj* to the *Hindu Mahasabha* emerged as the champions of the Hindus. Its political translation began mainly with BG Tilak (1856-1920) who used Hindu festivals to organise

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<sup>303</sup> For a pious Hindu, to live in such places, or to undertake a pilgrimage to one of them, is enough to destroy one’s sins and assist in the attainment of liberation from the cycle of life, death and rebirth. See, AE Morinis, *Pilgrimage in the Hindu Tradition: A case-study of West Bengal* (OUP, Delhi 1984) 4-46.

<sup>304</sup> H Elgood, *Hinduism and the Religious Arts* (Cassell, London 1999) 95.

<sup>305</sup> The practice of pilgrimage is one activity traditional in every part of India. The goal of pilgrimage is mostly to do with healing, and even if this is not achieved people feel improved in the process. SM Bhardwaj, *Hindu Places of Pilgrimage in India* (University of California Press, London 1983) 102.

<sup>306</sup> DS Sharma, ‘The Nature and History of Hinduism’ in KW Morgan (ed), *The Religion of the Hindus* (The Ronald Press Company, New York 1953) 25.

<sup>307</sup> AR Choudhury ‘Hinduism’ in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 69.

<sup>308</sup> RS Sharma and others, ‘Ramjanmabhumi- Babri Masjid: A Historians’ Report to the Nation’ in AG Noorani, *Babri Masjid Question 1528-2003* (Tulika Books, New Delhi 2003) Vol I, 45-6.

<sup>309</sup> *Hindutva* means ‘politics of the Hindu elite, constructed around upper caste Hinduism, asserting India to be the land of the Hindus, where Muslims, Christians and others are foreign races’. R Puniyani, *Hindu Extreme Right-Wing Groups: Ideology and Consequences* (South Asian History Academic Papers, Leicester 2002) 44.

the Hindus, and anti-Muslim rhetoric was consistently used.<sup>310</sup> At the same time, Ram was popularised as a symbol of moral power, along with *Hanuman* (a monkey god) symbolising masculine strength. The first exponent of *Hindutva* was V D Savarkar (1883-1966) who mixed *Brahminic* Hinduism<sup>311</sup> with nationalism reflecting the interests of upper castes. His work on *Hindutva*<sup>312</sup> became and remains the basic text defining this political concept, and influenced subsequent Hindu militant organisations.<sup>313</sup> According to Savarkar, only those who regard India as their motherland and holy land are truly Hindu and this is interpreted such that Christians and Muslims, whose holy places are in Jerusalem and Mecca, are not equal with the Hindus.<sup>314</sup>

Hindu militant organisations together are known as the *Sangh Parivar*, the ‘family of the Hindu national organizations’.<sup>315</sup> In 1925, Hedgewar floated the organization *Rastriya Swayam Sevak Sangh* (RSS - National Volunteer Corps), on the holy day of *Vijaya Dasami* (the triumphant tenth day) in Nagpur, India. The RSS began as an explicitly upper-caste Hindu organization, working for the achievement of a Hindu nation. This is a parent organisation for all other Hindu militant organisations.

In reaction to the growth of communism in certain areas of India, RSS started its first organisation in July 1948 *Akhil Bharatiya Vidyarthi Parishad* (ABVP - All India Students Organization). Among the first components of the *Sangh Parivar* was a political party. Until the 1950s, the RSS leaders had all preferred to remain aloof from politics, since they claimed to be a cultural organisation. After 1950, the RSS leaders wanted to reach out into politics. Hence *Bharatiya Jana Sangh* (BJS) was established just before the first general election in 1951.

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<sup>310</sup> Ram Puniyani, *Hindu Extreme Right-Wing Groups: Ideology & Consequences* (Media House, Delhi 2004) 23.

<sup>311</sup> Brahminic Hinduism is dominated by the upper caste Hindus.

<sup>312</sup> VD Savarkar, *Hindutva: Who is a Hindu?* (Swatantrayaveer Savarkar Rashtriya Smarak, Mumbai 1999)

<sup>313</sup> WK Andersen and SD Damle, *The Brotherhood in Saffron: The Rastriya Swayamsevak and Hindu Revivalism* (Vistaar, Delhi 1987) 33.

<sup>314</sup> Ram Puniyani, *Hindu Extreme Right-Wing Groups: Ideology & Consequences* (Media House, Delhi 2004) 25-6.

<sup>315</sup> *Sangh* means organizations and *Parivar* means family. *Sangh Parivar* means ‘Family of Hindu Nationalist Organizations’ which is an umbrella organization of Hindu militant groups.



In 1952, the *Vanavasi Kalyan Ashram* (VKA - Centre for Tribal Welfare), was founded to counter the growing influence of the Christian missionaries among the tribal communities. The main objective of the VKA was to reconvert those who had become Christians.<sup>316</sup> In 1955, another component of the *Sangh Parivar*, the *Bharatiya Mazdoor Sangh* (BMS), a trade union, was founded to check the growth of 'leftist' labour unions. The BMS became the largest labour union and in 2000 it had about 3400 unions with a 4.5 million membership across the country.<sup>317</sup>

The major component of *Sangh Parivar*, which is vital for our case study, *Vishwa Hindu Parishad* (VHP) was founded in 1964.<sup>318</sup> In Hinduism, there existed several sects which represented innumerable rival schools of thought and this division was perceived as the root causes for the weaknesses of Hinduism. The VHP was therefore created to endow Hinduism with a church-like centralized structure and to use this new ecclesiastical apparatus to counter Christian proselyte activities. VHP worked in close association with former rulers, businessmen, respectable politicians and the religious heads of several Hindu sects and monasteries. From 1984, VHP conducted campaigns to liberate sacred sites where Muslim mosques were built in the previous centuries. Particularly, they took up the Babri Masjid –Ramjanmabhumi dispute and claimed the ownership of it to build a Ram temple in its place. For this purpose, in 1986, VHP created a trained youth-wing called *Bajrang Dal*, which was involved in violent activities before and after the demolition of the Babri mosque in 1992.

In 1980, the political party BJS became *Bharatiya Janata Party* (BJP) and contested elections. In the 1990s BJP became the largest party in the Parliament and formed the government in 1998 with the support of other small parties. Now, the BJP is the main opposition party in Indian political life. Together these Hindu militant organisations are

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<sup>316</sup> *Vanvasi kalyan Parishad* <<http://vanvasikalyanparishad.org/home.htm>> accessed 16 November 2005.

<sup>317</sup> *Bharatiya Mazdoor Sangh* <<http://www.bms.org.in/home.htm>> accessed 16 November 2005.

<sup>318</sup> The *Vishwa Hindu Parishad* (VHP) was established in 29/30 August 1964 under the auspices of the RSS as a reaction to the activities of the Christian Missionaries. See, SS Apte, 'Why Vishwa Hindu Parishad' *Organiser* (New Delhi, Diwali Special Issue 1964) 15. *Vishwa Hindu Parishad* <<http://www.vhp.org/>> accessed 17 November 2005.

called '*Sangh Parivar*'.<sup>319</sup> Outside the *Sangh Parivar*, *Shiv Sena* (Army of Shivaji, a Hindu King who ruled Maharashtra), is a major militant organization and a political party. These organizations campaign for declaring India as a Hindu state and to be ruled by a Hindu Constitution.

To recapitulate, Hinduism is very eclectic and has been able to accommodate various beliefs and practices for the past thousands of years. Although there is a lack of an ecclesiastical authority, the Hindu moral code and basic beliefs in *Dharma*, help the Hindu community to move forward as a living religion. Central to the faith have been the temples, which played a major role in keeping the Hindu community together for so long. Though worship for a Hindu is a private affair, temples are significant in a Hindu's life for his spiritual as well as his social life. Pilgrimage to temples built upon sacred sites like Ayodhya, Kasi, Madura, to mention a few, gain prime importance for every Hindu for their liberation from rebirth. These sacred sites have become tools for communal organisations to mobilise the majority Hindus to declare India as a Hindu State.

### 2.5.2. Islam in India

Islam is both a religion and a complete way of life for a fifth of the world's population.<sup>320</sup> Islam literally means 'submission' (to God), in Arabic. Islam is a religious faith which sets out a codified way of living for its adherents in areas such as personal hygiene, business, food, dress, family life, and civil and criminal law.<sup>321</sup> Muslims claim that Islam is not a new religion, but is the same truth that Allah revealed through all his prophets to every people from the time of the first prophet Adam<sup>322</sup> onwards. Although the whole world is considered as a place of worship, Islam has established its own sacred sites. This section analyses the characteristic of Islam, its sacred sites and worship.

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<sup>319</sup> C Jaffrelot, *The Sangh Parivar: A Reader* (OUP, New Delhi 2005) 1-22.

<sup>320</sup> 'Islam – Facts One Must Know' <<http://www.alinaam.org.za/library/islamf.htm>> accessed 20 November 2006.

<sup>321</sup> JR Hinnells, *Living Religions* (Penguin books, London 1997) 162.

<sup>322</sup> Muslims, Jews and Christians believe that Adam and Eve were the first family in the human history.

### 2.5.2.1. History and Characteristics of Islam

Though belief in one God was known and flourished in the Arabian Peninsula for centuries, due to the teachings of Judaism and Christianity, the inhabitants of Mecca and the surrounding areas were followers of polytheism. In the sixth century, Mecca became a prosperous commercial centre, which resulted in the unequal distribution of wealth amongst a people which previously had lived according to the traditional system of Arab tribal values. It was during this time and in this social environment that the Prophet Muhammad preached the message of the Quran, which formed the basis of Islam, calling all to return to the worship of the one true god and a socially just society.<sup>323</sup>

Fearing the economic repercussions of Muhammad's preaching against the deities worshipped by the pilgrims at Mecca's central shrine, the *Kaba*, the leading families of the city persecuted Muhammad and his followers. In 622 AD, Muhammad and his followers made the *hijrah*<sup>324</sup> to Medina where within the short period of ten years, Muhammad, the religious leader of a small band of emigrants, rose to become the political and religious leader of virtually all of central and western Arabia.<sup>325</sup>

After Muhammad's death in 632 AD, the political and spiritual leadership of the Muslim community was assumed by a succession of caliphs<sup>326</sup> or 'deputies' of the prophet, who ruled Islam in all aspects, except as prophet. After the death of the fourth caliph, Ali<sup>327</sup> (661 AD), the Muslim community split, the majority later being called *Sunnis*.<sup>328</sup> The largest minority group, the *Shias*, take their name from their identification as the 'party of Ali'.<sup>329</sup>

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<sup>323</sup> JL Esposito, *What Everyone Needs to Know about ISLAM* (OUP, Oxford 2002) 7.

<sup>324</sup> In 622 AD, the Muslim year during which the Hijra occurred was designated the first year of the Islamic calendar by Umar in 638. (*anno hegirae* = 'in the year of the hijra'). *Hijrah* means 'migration'.

<sup>325</sup> JR Hinnells, *Living Religions* (Penguin books, London 1997) 166-67.

<sup>326</sup> The first caliph was Abu Baker who served from 632-634. The second Caliph was *Umar* who was considered one of the greatest military leaders and extended the frontiers of Islam beyond Egypt. The third Caliph was *Utman* and during his period the Quran was collected and put into an authorized recession, thus preserving intact the precious message and averting serious dissensions among Muslim groups.

<sup>327</sup> Ali was Muhammad's cousin and son-in law.

<sup>328</sup> JR Hinnells, *Living Religions* (Penguin books, London 1997) 167.

<sup>329</sup> Ibid 206.

Islam came to India when Muslims arrived in *Sindh*<sup>330</sup> in 712, Punjab in 1027 and Delhi in 1206.<sup>331</sup> From 1206, Muslims established themselves at Delhi and Islam became an inseparable life of India.

Among the many works in classical Arabic, the one that many people consider to be the first source for Islamic belief and practice is the Muslim's sacred scripture, the *Quran*, which means 'recitation'. Next to the Quran stands the multi-volume collection of accounts called *Hadith*, which means tradition, that report or allege to report, sayings and deeds of the Prophet Muhammad and his companions.<sup>332</sup>

Five fundamental rituals, called the 'pillars of Islam' are regarded as essential public signs of a Muslim's submission to God and identity with the Muslim community.<sup>333</sup> The five pillars are *Shahada*<sup>334</sup> *Salat*<sup>335</sup> *Zahat*<sup>336</sup> *Sawn*<sup>337</sup> and *Hajj*.<sup>338</sup> The pillars of Islam and other rituals eventually came to be regulated in detail by Islamic law. Muslims worldwide celebrate two major festivals, the *Id-al-Fitr* (the feast of the breaking of the fast) and the *Id-al-Adha* (the feast of the sacrifice) which commemorates Abraham's faith by his willingness to sacrifice his son.<sup>339</sup> All Muslims share certain beliefs and practices, such as belief in one God, the Quran, Muhammad, and the five Pillars of Islam.

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<sup>330</sup> *Sindh* was a North Indian kingdom.

<sup>331</sup> KA Faruqi, 'Impact of Hindu Society on Indian Muslims' in Christian W Troll (ed), *Islam in India: Studies and Commentaries* (Vikas, New Delhi 1985) 4-5.

<sup>332</sup> FM Denny, *An Introduction to Islam* (Macmillan, New York 1994) 159.

<sup>333</sup> AS Ahmad, *Living Islam: From Samarkand to Stornaway* (BBC Books, London 1993) 12-39.

<sup>334</sup> *Shahada* means a simple statement declaring belief and bearing witness in the one God and accepting Muhammad as the messenger. Muslims believe this declaration allows a person to enter Islam.

<sup>335</sup> *Salat* means prayer. Muslims must pray five times a day and each prayer takes about five to ten minutes.

<sup>336</sup> *Zahat* means giving alms.

<sup>337</sup> *Sawn* means the habit of fasting.

<sup>338</sup> *Hajj* means pilgrimage. The fifth pillar of Islam is the Great Pilgrimage or *Hajj*, which consists of a number of rituals performed at sacred monuments in and near Mecca. The Hajj is required of all Muslims at least once in a lifetime if they are physically able to make the trip and can afford it.

<sup>339</sup> Abraham is venerated by Jews, Christians, and Muslims as the 'father of the faith'. They all trace their traditions back to him.

### 2.5.2.2. Islamic Worship and establishing sacred sites

The English word, *mosque*, is a corruption of the Arabic word 'masjid' which means a 'place of prostration'.<sup>340</sup> The mosque is the central site to the Muslim way of life, because it is the location where communal activities take place, but more importantly it is the area in which Muslims say their prayers. The mosque is a sacred place where the faithful perform their devotions, their five daily prayers, without any distinction being made of caste, creed, or colour.<sup>341</sup>

The genesis of the mosque, according to the tradition, is to be found in the house erected by the Prophet in Medina immediately after his safe arrival from Mecca. The structure was completed in the first months of the new Islamic era marked by the *hijrah* (1/622).<sup>342</sup> Because Allah has ordained it, (Quran: Sura 62:9), Friday prayers are the most significant for the Muslim community<sup>343</sup> and as such the prayers are led by a religious leader who is a Quranic scholar, in a mosque or in some other suitable place.<sup>344</sup>

Hence, mosque is a place where the faithful, either as individual or as a community, continually gather to worship. From any mosque, the Muslim is aware of being part of a divinely centred and guided community. A Muslim's experience of faith is based on the Quran and the mosque is the place where public witness is given to that experience. However, the term mosque is a universal term, which means that the whole earth or anywhere on earth becomes a 'principal mosque'<sup>345</sup> where Muslims can worship.

This now leads us on to how the concept of sacred sites is constructed within Islam. Whereas other religions such as Hinduism or Christianity believe that a sacred site is blessed with the presence of god or gods, in Islam, it is the continued worship which constructs sacred sites.<sup>346</sup> This view is shared by Gilsenan who stated, 'whether a mosque

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<sup>340</sup> K Cragg, *The Call of the MINARET* (William Collins Sons & Co, London 1986) 99.

<sup>341</sup> AS Ahmad, *Living Islam: From Samarkand to Stornaway* (BBC Books, London 1993) 210.

<sup>342</sup> D Waines, *An Introduction to Islam* (CUP, Cambridge 1995) 196.

<sup>343</sup> A Tayob, *Islam: A Short Introduction* (One world Publications, Oxford 1999) 62.

<sup>344</sup> M Forward, 'Islam' in J Holm and J Bowker (eds), *Worship* (Pinter, London 1994) 101-2.

<sup>345</sup> SH Nasr, *Traditional Islam in the Modern World* (K Paul International, London 1990) 10.

<sup>346</sup> A Tayob, *Islam: A Short Introduction* (One world Publications, Oxford 1999) 59.

exists or not, a Muslim can construct a sacred space set apart for prayer in any place - in his own or another's house, or outside in the streets if he wishes'.<sup>347</sup> Islam extends the sacred into the secular by its use of worship, architecture and traditional city planning, thereby sanctifying the place.<sup>348</sup>

As with other religions, Islam also has distinguished places which are accorded special significance, due to their historical and ritual importance within Islam which gives them a degree of eminence.<sup>349</sup> The process of establishing a sacred place includes that of a place where Muhammad lived, or visited, a mosque where Muslims have prayed for centuries, (for example, the Babri mosque) and a place where a holy man has lived and died.

### 2.5.2.3. Muslim communal organisations

At the close of the nineteenth century, when the Indian National Congress was formed, a few Muslim leaders feared that in a majoritarian Hindu India their interests would be threatened. That is the reason why the All India Muslim League was founded at Dhaka (now in Pakistan) in 1906. It was a political party in British India, and was the driving force behind the creation of Pakistan as a Muslim state from the Indian subcontinent. After the independence of India and Pakistan, the Muslim League continued as a minor party in India.<sup>350</sup> Now it is known as the Indian Union Muslim League (IUML) and the chief support base of the party is in Kerala. IUML was founded on March 10, 1948 and claims to be the political organization of all Indian Muslims, but only a fraction of the Muslim masses of the country supports the party.

The *Jamaat-e-Islami* was formed in Lahore (now in Pakistan) by Maulana Maududi in 1941. After the partition of India, Maududi moved to Pakistan but a small group of Jamaat activists remained in India to preserve the Jamaat organisation. While the Jamaat in Pakistan and Bangladesh are influential and active political parties, the Jamaat-e-Islami

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<sup>347</sup> M Gilson, *Recognizing Islam* (IB Tauris, London 1990) 179.

<sup>348</sup> C Bennett, 'Islam' in J Holm and J Bowker (eds) *Sacred Place* (Pinter, London 1994) 88-112.

<sup>349</sup> Ibid 61. There are three sites which have the highest acclaim of every Muslim: the Sacred Mosque in Mecca, to which all Muslims turn in worship; Medina the Prophet Muhammad himself established his community there; Al-Aqsa Mosque in Jerusalem because it was the home of the previous prophets.

<sup>350</sup> Indian Union Muslim League <<http://www.indianunionmuslimleague.com/>> accessed 22 July 2006.

Hind does not exercise much influence on the political situation in India, nor does it participate in elections. However, it remains one of the foremost Islamic political organisations in the country. The Jamaat seeks to establish an Islamic state in India, which it advocates as the only solution to India's social and economic problems. It advocates the abolishment of secularism and democracy and the imposition of Shariah Islamic law. It often leads political agitation on the cause of Islamic law and other issues of the Muslim communities.<sup>351</sup>

The Students Islamic Movement of India (SIMI) was formed in Aligarh, Uttar Pradesh state, in April 1977. The stated mission of SIMI is the 'liberation of India' from western materialistic cultural influence and to convert it into a spiritual society. This organization is believed by many, including the Government of India, to be involved in terrorism. It was outlawed by the Indian Government in 2002, and fears exist in government circles that it has been penetrated by Al-Queda. SIMI originally emerged as a student wing of the Jamaat-e-Islami Hind (JIH), and identifies the Hindu population and Hindu organizations such as the *Sangh Parivar* as enemies of Islam. SIMI organized violent protest against the demolition of the Babri Mosque, in the nationwide violence that followed the demolitions, and clashed with police and the *Sangh Parivar*. The Government of India, Ministry of Home Affairs by notification dated 08-02-2006 has banned Students Islamic Movement of India (SIMI) for the third time.<sup>352</sup>

*Islam Sevak Sangh* (ISS), which means organization of servants of Islam, was founded by A.N. Madani in 1990, in Kerala, India. *Islam Sevak Sangh* is a reactionary development of the Hindu communal organization RSS. Soon after the Babri Masjid demolition, Madani disbanded the ISS and formed the People's Democratic Party (PDP) to forge a broad Muslim-dalit-backward caste alliance and started fielding candidates in elections.

The All India Babri Masjid Action Committee (AIBMAC) was formed in February 1986 as a reaction to the court order on 1 February 1986 to open the locks of Babri Mosque to the

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<sup>351</sup> Jamaat-e-Islami Hind <<http://www.jamaateislamihind.org/>> accessed 22 July 2006.

<sup>352</sup> 'Students Islamic Movement of India' <<http://www.satp.org/satporgtp/countries/india/terroristoutfits/simi.htm#>> accessed 20 July 2006.

Hindus for the worship of idols. AIBMAC launched a movement for the liberation of their ancient mosque, and is involved in democratic means to establish their claim over the Babri Masjid site. The All India Babri Masjid Coordination Committee (AIBMCC) is another movement involved in the Babri Masjid restoration process.

To sum up, Islam as a universal religion represents a basic unity of belief within a varied cultural diversity. In Islam everything that exists is sacred, and a sacred site in Islam fulfils a 'making-one' function as an earthly manifestation of divine.<sup>353</sup> They are not only places of worship, but also engage the social and political life of the Muslim community. Mosques are necessary for Friday prayers and for other community functions like education, marriage, feasts and funerals. These suggest that mosques are also the centre of social life in every Muslim community.

## 2.6. Conflict between religious groups

Religion is at the heart of the complex social web of India, and as such religion cannot be seen merely as a theological and metaphysical force alone but as central to the socio-political debate.<sup>354</sup> There have been an increasing number of religious conflicts from the close of nineteenth century onwards, with the main source of conflict being between the Muslims and the Hindus.<sup>355</sup> In India, as Paul Brass has noted, both Hindu and Muslim communities have a tendency to define themselves and act as political constituencies.<sup>356</sup>

Caste and communal problems have become intertwined in Indian politics.<sup>357</sup> In their struggle for power and hegemony, the Hindus and also the Muslims use religion and thus

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<sup>353</sup> C Bennett, 'Islam' in J Holm and J Bowker (eds), *Sacred Place* (Pinter, London 1994) 112.

<sup>354</sup> AA Engineer, *Politics of Confrontation: The Babri- Masjid Ramjanmabhumii Controversy Runs Riot* (Ajanta, Delhi 1992) xii.

<sup>355</sup> Human Rights Watch, *Playing the Communal Card: Communal Violence and Human Rights* (Human Rights Watch, London 1995) 19.

<sup>356</sup> PR Brass, 'Introduction: Discourses of Ethnicity, Communalism and Violence' in PR Brass (ed), *Riots and Pogroms* (Macmillan, London 1996) x.

<sup>357</sup> For instance, when the VP Singh government implemented the Mandal Commission Report which gave more advantage to the Other Backward castes through reservation policy, LK Advani converted it into a communal problem by declaring a chariot procession to build Ram temple in Ayodhya. DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 194.



reinforce each other's communalism. Politicians appeal to communities based on their caste and religion in order to garner votes, knowing that every caste and community guards its identity.<sup>358</sup> Such use of identity brings confrontation and leads to inter-caste and inter-communal violence.<sup>359</sup>

Hindus see the Muslims as alien rulers who never assimilated with the Indian cultural ethos. Not only are Muslims looked upon as essentially 'foreign', but also as demolishers of Hindu temples.<sup>360</sup> This viewpoint is encapsulated by the following slogan, 'O Babar progeny, go to Pakistan or cemetery'.<sup>361</sup> The Babri Masjid – Ramjanmabhumi controversy and its emotional potential has to be seen in this perspective.

Violent conflicts on religious lines in India seem to be the result of using religion as an ideological tool for defining identity and then contesting for power. Hindu militant forces and Islamic communal forces both have used religion as an ideological tool.<sup>362</sup> However, it has to be noted that still only a sizable and vocal minority from these communities support these militant organisations and the majority of people remain outside their influence. It suggests that the language used to define communal conflicts has to be refined as such not to hold responsible a whole community as a communal outfit.

While describing the growth of communal organisations, many condemn the political parties and the executive machinery and highlight the impoverishment of socio-economic factors in the country.<sup>363</sup> For instance, Ashutosh Varshney points out three factors namely, a) rise of separatist movements in the 1980s which threatened the nation b) institutional decay of the Congress Party and of an absence of other centrist alternatives and c) an

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<sup>358</sup> AG Noorani, *Babri Masjid Question 1528-2003* (Tulika Books, New Delhi 2003) Vol I, xxi.

<sup>359</sup> A Chase, 'Pakistan or the Cemetery!: Muslim Minority Rights in Contemporary India' (1996) 16 B C Third World L J 35, 35.

<sup>360</sup> PJ Patel, 'Communal Riots in Contemporary India: Towards a Sociological Explanation' in U Baxi and Parekh (eds), *Crisis and Change in Contemporary India* (Sage, London 1995) 370-73.

<sup>361</sup> A Chase, 'Pakistan or the Cemetery!: Muslim Minority Rights in Contemporary India' (1996) 16 B C Third World L J 35, 35.

<sup>362</sup> AA Engineer, *Politics of Confrontation: The Babri- Masjid Ramjanmabhumi Controversy Runs Riot* (Ajanta, Delhi 1992) xiii.

<sup>363</sup> P Heehs, *Nationalism, Terrorism, Communalism: Essays in Modern History* (OUP, Delhi 1998) 125.

opportunistic twisting of secular principles in Indian politics.<sup>364</sup> Although to a certain extent this is true, the role of judiciary has been continuously neglected in their argument against communal organisations. The Constitution and other domestic laws have empowered the courts to protect values such as democracy, the rule of law, and secularism from the onslaught of communal outfits from any religious community either majority or minority. As seen in the section on Indian judiciary, the courts are the custodians of fundamental rights. This suggests that if the courts remain impartial and challenge the communal forces based on the values enshrined in the Constitution, religious militant organisations may be controlled. After many communal riots, the role of the judiciary is far from satisfactory including the Ayodhya dispute.<sup>365</sup>

Analysis of communal conflicts illustrates that the secular forces have become the target of continuous attacks from religious militant groups. In a religiously divided State, the judiciary will be able to protect the rights of such groups which are necessary to build up a strong civil society. Hence, to effectively limit and control the communal conflicts, an active, impartial, and independent judiciary becomes necessary.

## 2.7. Concluding Observations

The research context presented above has defined the meaning and importance of the sacred sites in any religion and how attack of any kind on them goes against the fundamental religious right of a faith community. Against this backdrop, the review of international legal instruments has brought to the fore how the available laws are insufficient to settle the disputes relating to a sacred site. Obviously, a model convention to intervene for the protection of the disputed site and the promotion of human rights is found imperative.

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<sup>364</sup> Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (Yale University Press, New haven 2002) 72.

<sup>365</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 469.

The Indian legal system as it is today seems complacent and inefficient to settle a dispute of the magnitude and proportion of Ayodhya. Therefore, the historical necessity for evolving a regional convention which can be both powerful and prompt is felt to be obvious.

Sacred sites in virtually all religions have not only spiritual but also socio-political, cultural significance, and hence, they need legal protection. This is not just the case for Hinduism and Islam, the religious groups at dispute in Ayodhya. Dispute over sacred sites can occur any where at any time. Since, the religious claims are profound claims, when disputes based on a sacred site arise between two different faiths who claim the same site as their own, the claim becomes incompatible. These competing claims over a sacred site if not settled legally, fairly and as speedily as possible, can create more tension between those religious groups and over time, this tension increases considerably leading to egregious human rights violations. In settling these disputes, the state and the judiciary should be seen to play an impartial role in protecting the rights of religious communities because any discrimination on their part leads to the violation of human rights of one religious community against the other.

Moreover, when these claims become entrenched with power politics, such claims might exacerbate communal conflicts and the denial of human rights to the minority religious communities. So protecting them by the legal instruments of the domestic and international communities seems obligatory. A quick and impartial remedy to sacred site disputes by the proposed regional court in the Model Convention would resolve the claims of competing religious groups promptly and prevent further communal conflicts and violation of human rights. These themes are more fully developed in the following chapter on the case study, the Ayodhya dispute.

## CHAPTER 3

### THE BABRI MASJID-RAM TEMPLE DISPUTE

#### 3.1. Introduction

This chapter presents a case study on Ayodhya: the Babri Masjid-Ram temple dispute. It is divided into four sections. It begins with a historical overview of the legal dispute, from the pivotal period of the late nineteenth to the early twenty-first centuries. The second section focuses on the litigation and state action in both pre-independent as well as post-independent India. The third analyses the role of various organs of the Indian state in settling the dispute, and the fourth brings out the conclusions emerging from the case study.

#### 3.2. Historical overview of the dispute

This historical overview is from an alternate and secular narrative. A brief history of disputes between 1856 till 1946 will be followed by a more extensive examination of the events which led to the demolition of the mosque in 1992 and conclude with an analysis of the aftermath of the demolition.

##### 3.2.1. Significance of Ayodhya

Ayodhya is a North Indian town situated in the Faizabad district in the state of Uttar Pradesh (UP). Panikkar sees Ayodhya having some connection with all major religions in India.<sup>1</sup> For instance, in relation to the Buddhists<sup>2</sup>, Chinese pilgrim *Hsuan Tsang* (627-643) mentions that when he visited Ayodhya, there were some three thousand Buddhist monks

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<sup>1</sup> KN Panikkar, 'A Historical Overview' in S Gopal (ed), *Anatomy of a Confrontation: The Babri Masjid-Ramjanmabhumi Issue* (Viking, New Delhi 1991) 25-6.

<sup>2</sup> Buddhism, founded by Buddha, the 'enlightened one', lived approximately between 566-486 BCE. Buddha, previously known as Siddhartha, son of a Chief of Sakya clan, left his comfortable life to seek enlightenment. He attained enlightenment at Bodh Gaya, now in Bihar at the age of thirty-five and was addressed as Buddha. He taught his Way or *Dhamma* to his disciples. See, AL Basham, *The Wonder that was India* (Sidgwick & Jackson Great Civilizations Series, 3<sup>rd</sup> rev edn, Sidgwick & Jackson, London 1967) 256-87; P Heehs (ed), *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (Hurst & Co, London 2002) 103-30.

living in approximately one hundred Buddhist monasteries and a large temple.<sup>3</sup> It is also a holy city for Jains<sup>4</sup>. Five Jain *Tirthankars*<sup>5</sup> or religious teachers were born in Ayodhya. Ayodhya is a sacred site too for the Sikhs.<sup>6</sup> It is widely believed that their founder, Guru Nanak Dev, visited and lived in Ayodhya c1557. However, the important point to note is the religious affiliation that the Hindus and Muslims have with the place.<sup>7</sup>

### 3.2.2. Significance of Ayodhya to Hindus

Ayodhya is considered an auspicious site by the Hindus. It is located on the banks of the river *Sarayu*, and so it is considered as a *tirtha*<sup>8</sup> for pilgrims. Although Ayodhya existed as a *Saivic*<sup>9</sup> centre for many centuries, only in the eighteenth century, it became a dominant *Vaishnavite*<sup>10</sup> centre.<sup>11</sup> Significantly, Ayodhya is seen by Hindus as the birthplace of Ram. A key source is the Ramayana, which claims to be a biographical account of the life of

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<sup>3</sup> Hans Bakker, *Ayodhya* (Institute of Indian Studies, Groningen 1984) 38.

<sup>4</sup> Jainism was founded by *Vardhamana*, later called *Mahavira*, son of a chieftain, born in 599 BCE near Patna in Bihar. He renounced the world at the age of thirty. After thirteen years of asceticism, he won over the lower principle of existence and so called as *Jina*, or 'Victor'. Known as *Mahavira*, 'Great Hero', those who follow his path of *Jina* are known as Jains. See, P Heehs (ed), *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (Hurst & Co, London 2002) 89-102; AL Basham, *The Wonder that was India* (Sidgwick & Jackson Great Civilizations Series, 3<sup>rd</sup> rev edn, Sidgwick & Jackson, London 1967) 287-97.

<sup>5</sup> For Jains, *Mahavira* was the twenty-fourth and last *Jina* of the present world cycle. The twenty-third was *Parshvanatha*, whose historicity is generally acknowledged. The others said to have lived thousands of years ago who were called *Nirgranthas* (free from bonds). These twenty four Great Teachers are called *Tirthankaras*, means 'ford-makers'. See, P Heehs (ed), *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (Hurst & Co, London 2002) 90; AL Basham, *The Wonder that was India* (Sidgwick & Jackson Great Civilizations Series, 3<sup>rd</sup> rev edn, Sidgwick & Jackson, London 1967) 288.

<sup>6</sup> Sikhism is an Indian religion founded by Guru Nanak (1469-1539). The followers and his nine successor Gurus are called 'Sikhs' or 'disciples'. The system of belief and practice based on the teachings of the Sikh Gurus is known as Sikhism. P Heehs (ed), *Indian Religions: A Historical Reader of Spiritual Expression and Experience* (Hurst & Co, London 2002) 375-97.

<sup>7</sup> For more information on Ayodhya, see S Gopal (ed), *Anatomy of Confrontation: Ayodhya and the Rise of Communal Politics in India* (Zed, London 1993) and for a contrasting view, K Elst, *Ram Janmabhoomi vs Babri Masjid* (Voice of India, New Delhi 1990).

<sup>8</sup> Text to n 292 in chapter 2.

<sup>9</sup> There are three major sects in Hinduism namely, *Saivism*, *Vaishnavism* and *Sakthi* worship. The worshippers of Lord Siva are called *Saiva* and their tradition is called *Saivic* tradition.

<sup>10</sup> A major sect in Hinduism is called *Vaishnavism* who worship Lord Vishnu. The popular *Vaishnavite* belief is that Vishnu took ten incarnations (*Avathars*) including incarnation of god Rama, Prince of Ayodhya and hero of epic Ramayana. AL Basham, *The Wonder that was India* (Sidgwick & Jackson Great Civilizations Series, 3<sup>rd</sup> rev edn, Sidgwick & Jackson, London 1967) 300-303.

<sup>11</sup> S Gopal and others, 'The Political Abuse of History: Babri Masjid-Ramjanmabhumi Dispute – An Analysis by Twenty-Five Historians' in AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (Tulika Books, New Delhi 2003) Vol 1, 30.

Ram, ruler of the Ayodhya kingdom. Having fought to save the world from the power of demons, Ram ruled Ayodhya, exemplified in prosperity, caste purity, and happiness.<sup>12</sup>

Ramayana places these events in the age of *Treda*,<sup>13</sup> in the distant past. According to Hindu belief, Ayodhya then disappeared, at the end of the second of four world periods within Hindu cosmology. The rediscovery of Ayodhya took place in the present age by king *Vikramaditya*.<sup>14</sup> The king located the site through meditation and at least within Hindu traditional accounts, he constructed a huge temple on the birth site of Ram. The archaeological and historical evidence does not seem to support the existence of such a structure, but this does not affect its significance in Hindu views of the site, and the subsequent dispute.<sup>15</sup> The *Sangh Parivar*<sup>16</sup> argue that the temple built by king *Vikramaditya* was later destroyed to allow construction of Babri Masjid in 1528, thus giving Hindu claims over the site temporal priority.<sup>17</sup>

When *Ramanandhis* came and settled in large numbers in Ayodhya from the eighteenth century, Ayodhya was established as a major pilgrim centre in North India.<sup>18</sup> According to Bawa, in 1991 the estimated number of Hindu temples was six thousand, and most of the

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<sup>12</sup> Peter van der Veer, 'Riots and Rituals: The Construction of Violence and Public Space in Hindu Nationalism' in PR Brass (ed), *Riots and Pogroms* (Macmillan, London 1996) 160.

<sup>13</sup> In Hindu cosmology, cosmos passes through cycles within cycles for eternity. The basic cycle is the *Kalpa*, formed by a thousand *Mahayugas*. Each *Mahayuga* is divided into four *yugas* or ages called *Krita*, *Treta*, *Dvapara* and *Kali*. Their lengths are respectively 4,800, 3,600, 2,400 and 1,200 'years of the Gods', and each year equals 360 human years. According to Hindu mythology, Rama spent his youth in Ayodhya and was king during the *Treta-yuga*, thousands of years before our present age, the *Kali-yuga*. For details, see, AL Basham, *The Wonder that was India* (Sidgwick & Jackson Great Civilizations Series, 3<sup>rd</sup> rev edn, Sidgwick & Jackson, London 1967) 320-21.

<sup>14</sup> A Copley, 'Indian Secularism Reconsidered: From Gandhi to Ayodhya' (1993) 2 *Contemporary south Asia* 47, 57.

<sup>15</sup> R Friedland and R Hecht, 'The Bodies of Nations: A Comparative Study of Religious Violence in Jerusalem and Ayodhya' (1998) 38 *History of Religions* 101, 106.

<sup>16</sup> *Sangh Parivar* means 'family of Hindu organisations', a term used to refer to a number of RSS-associated Hindu militant organisations.

<sup>17</sup> P van der Veer, 'God Must be Liberated!: A Hindu Liberation Movement in Ayodhya' (1987) 21 *Modern Asian Studies* 285-6; *Vishwa Hindu Parishad* Publication, New Delhi  
<[http://www.vhp.org/englishsite/e.Special\\_Movements/dRanjanambhumi%20Muti/historical\\_legalperspective.htm](http://www.vhp.org/englishsite/e.Special_Movements/dRanjanambhumi%20Muti/historical_legalperspective.htm)> accessed 08 June 2006.

<sup>18</sup> P van der Veer, *Gods on Earth: The Management of Religious Experience and Identity in a North Indian Pilgrimage Centre* (Athlone, London 1988) 36.

trade and employment opportunities relied upon the pilgrims.<sup>19</sup> By this time, Ayodhya had become a significant sacred site for Hindus all over India.

### 3.2.3. Significance of Ayodhya to the Muslims

As with the Hindu narrative, the Islamic narrative of the history of Ayodhya stresses the antiquity of the connection between religion and the site, long before conventional history would do so. Muslims argue that their attachment to Ayodhya dates back to the pre-Islamic period. According to the Quran, Adam and Eve were the first human persons on earth and one of their sons was Seth. According to Muslims, Seth was buried in Ayodhya and people still go and visit that tomb in Ayodhya. Equally important to Muslims is the tomb of Noah.<sup>20</sup> It is not known when these traditions were established. Although this claim was refuted by the great Muslim scholar of the sixteenth century, Abul Fazl,<sup>21</sup> when the researcher visited these sites, it is clear that both the locations continue to attract a substantial number of Islamic pilgrims.<sup>22</sup>

The early settlement of Muslims in Ayodhya suggests that the first Muslim invasion of *Avadh*, present day Ayodhya, occurred before 1030 AD. Within two centuries, Ayodhya became the headquarters of a Muslim province in the Delhi Sultanate before becoming part of the Mughal Empire. The first Mughal Emperor Babar defeated the ruler of Ayodhya in a battle and appointed *Mir Bagi Tashqandi* as the governor of Ayodhya region. During his rule, *Mir Bagi* built a mosque in Ayodhya in 1528.<sup>23</sup> From 1528 until the British period, Ayodhya was under Islamic rule.

Ayodhya is considered a '*Khurd Mecca*' (small Mecca), because of the large number of Muslim holy persons who are believed to be buried there and in the vicinity. Today the

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<sup>19</sup> M Bawa, 'Scenes From Ayodhya' *The Sunday Times of India* (New Delhi 3 November 1991) 18.

<sup>20</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997)10.

<sup>21</sup> In his *A'in-i-Akbari*, the author Abul Fazl, refutes these beliefs by stating that 'near the city (Ayodhya) stand two considerable tombs of six, seven yards respectively. The vulgar [sic] believe them to be the resting places of Seth and prophet Job [sic], and extraordinary tales are belted of them'. See, MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 82.

<sup>22</sup> T Mahmood, 'Ayodhya, Ram and Islam' in VN Mishra (ed), *Ramjanambhoomi Babri Masjid: Historical documents, Legal opinions and Judgements* (The Bar Council of India Trust, New Delhi 1991) 24-25.

<sup>23</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997)11.

ruins of hundreds of old tombs, and scores of crumbling mosques and Sufi *Khangahs*<sup>24</sup> lie scattered around Ayodhya, mainly in a state of complete neglect. There are more than fifty *Dargahs*<sup>25</sup> in Ayodhya. According to revenue records half of Ayodhya is covered with Muslim mosques, (approximately one hundred) and Muslim graveyards (more than one hundred). Hence, Muslims assert that they have strong claims over Ayodhya.<sup>26</sup>

### 3.2.4. Early history of the site: 1528-1857

As shown previously, early history of the site, to some extent, is peculiar to both the religious communities. The events which traditionally gave the site an ancient connection to both the Hindu and Islamic communities are difficult to corroborate with conventional history or through archaeology. From 1528, however, it becomes possible to present a history of the site which would, to some extent, receive broad support from the principal religious communities in dispute. The early history, however, remains contentious between the religious communities.

The origin of the Babri Masjid-Ram Temple dispute is obscure and tied closely to the current religious-political dispute. Hindu Source, *Sangh Parivar* alleges that *Babar*, the first Mughal Emperor, destroyed a magnificent and ancient Ram temple in order to build his Babri Masjid. The report of RS Sharma, and other historians, endorses the Muslim view that the mosque was built on an empty space, and that there was no evidence of the demolition of a Hindu temple.<sup>27</sup> European scholars, considering the issue during the British rule, give mixed views, but may have been in part motivated by a colonial policy of divide

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<sup>24</sup> *Khangah* is an abode of a Sufi saint. Sufism, a sect in Islam, may be described as a mystical practice that emphasizes certain unique rituals for guiding spiritual seekers into a direct encounter with God. Sufism – Mystic <<http://www.allaboutreligion.org/sufism.htm>> accessed 12 August 2006.

<sup>25</sup> *Dargah* is an Islamic shrine built over the grave of a revered religious figure, often a Sufi saint. Local Muslims perform pilgrimages to these shrines. They often include a mosque, a meeting room, schools (madrassas), residence for a teacher or caretaker, hospitals and other building for community purposes. The term is derived from a Persian word meaning 'portal' or a 'threshold'. Many Muslims believe that *Dargahs* are portals by which they can invoke the deceased saint's intercession and blessings. Martin Forward, 'Islam' in J Holm and J Bowker (eds), *Worship* (Pinter, London 1994) 113-4.

<sup>26</sup> Interview with Khaliq Ahmed Khan, Chairman of 'Ayodhya Faizabad Study & Research Centre' Faizabad (Faizabad 10 February 2006).

<sup>27</sup> RS Sharma and others, *Ramjanmabhumi-Babari Masjid: A Historians Report to the Nation* (People's Publishing House, New Delhi 1991) 6-7.



and rule, which might encourage dispute and division, rather than its resolution.<sup>28</sup> A brief review of the debate is necessary for an in-depth case analysis.

The first European source to link the site of Babri Masjid with Ram's birthplace is Tieffenthaler, a Jesuit priest. Writing in 1788 he noted that an earlier fortress, called *Ramcot*, had been demolished and replaced with an Islamic temple with three cupolas.<sup>29</sup> Later European sources similarly note the Hindu attribution of the destruction of a Hindu temple to Aurengzeb,<sup>30</sup> with Buchanan adding that 'the tradition seems very ill-founded',<sup>31</sup> while Beveridge on the other hand thought that '[presumably] the order for building the mosque was given during *Babar's* stay in *Aud* (Ayodhya) in 934 AH.'<sup>32</sup>

Perhaps one reason for the wide divergence of opinion by the early European writers is the silence of contemporary, or near contemporary, accounts on whether any temple was demolished in the process of building the mosque. The mosque itself includes an inscription claiming that *Mir Bagi*, a noble of *Babar*, had erected the *masjid*. There is nothing in the inscription to indicate that the *masjid* had been built on the site of a previous temple.<sup>33</sup> Hindu sources might be expected to be more forthcoming, but *Ramcharitmanasa*, Hindi translation of the epic Ramayana by the poet *Valmiki*, composed by *Tulsidas* during

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<sup>28</sup> M Shakir, *State and Politics in Contemporary India* (Ajanta, Delhi 1986) 164. The author has quoted the words of Charles Wood to the viceroy in 1862: 'if all India was to unite against us how long could we maintain ourselves'; S Srivastava, 'How the British Saw the Issue', in S Gopal (ed), *Anatomy of a Confrontation: The Babri Masjid – Ramjanmabhumi Issue* (Viking, Delhi 1991) 38-57.

<sup>29</sup> RS Sharma and others, *Ramjanmabhumi-Babri Masjid: A Historians Report to the Nation* (People's Publishing House, New Delhi 1991) 19. Sharma cites from Tieffenthaler's original work *Description historique et géographique de l'Inde* published by Johann Barnoulli from Berlin in 1788.

<sup>30</sup> AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 55-6.

<sup>31</sup> RS Sharma and others, 'Ramjanmabhumi-Babri Masjid: A Historians' Report to the Nation' (People's Publishing House, New Delhi 1991) 20; For more details, see, Buchanan's *Surveys* edited and printed by Montgomery Martin, *The History, Antiquities, Topography and Statistics of Eastern India* (Wm H Allen & Co, London 1838) Vol II, 333-36.

<sup>32</sup> AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 56-8. Beveridge presumes that the order for building the mosque was given during *Babar's* stay in *Aud* (Ayodhya) in 934 AH, at which time he would be impressed by the dignity and sanctity of the ancient Hindu shrine, (at least in part) displaced and like obedient follower of Muhammad, he was, in intolerance of another Faith, regarded substituting a temple by a mosque as dutiful and worthy.

<sup>33</sup> There are examples where Hindu temples were destroyed and Mosque was built at that site. To cite one such example, K Elst points out *Gyanvapi* mosque was built after many Hindu temples destroyed including the old *Kashi Visvanath* temple, one of the most sacred places of Hindus. Koenraad Elst, *Ayodhya: A Case against the Temple* (Voice of India, New Delhi 2002) 78-80.

1575-76, does not mention a Ram Temple at all – despite being composed within fifty years of the construction of the Babri Masjid.<sup>34</sup>

It is important to note that differing viewpoints existed on the dispute site. The Hindu community held that an ancient temple to Ram existed before the mosque was built and the Muslim community believed that no such temple existed before the mosque was built.

Leaving aside the question of the foundation of the mosque, we enter a period where there is greater consensus over the history of the area. When the Mughal Empire became weak, after the death of Emperor *Aurangazep* (1618-1707), the different provinces of the Mughal Empire came under the authority of local rulers called *Nawabs*. Ayodhya also came under the *Nawabs* until the British army took control in 1856.<sup>35</sup> Some writers argue that the transfer of *Nawab* administration from Ayodhya<sup>36</sup> to Faizabad should be seen as ‘the liberation of a Hindu sacred site’<sup>37</sup> since religious activities such as building new temples increased from the nineteenth century onwards in Ayodhya.<sup>38</sup>

### 3.2.5. Intra and inter-religious disputes: 1857-1946

In 1856, when power in India shifted from the East India Company to the British queen, Ayodhya too came under British forces. It is against this backdrop of radical political change that there is seen the first properly recorded dispute near the Babri Masjid. The dispute did not involve Hindus claiming the site as Ram’s birthplace, but rather Muslims claiming a Hindu temple as a mosque.

As recounted by Panikkar,<sup>39</sup> Muslims under the leadership of Shah Gulam Hussein claimed that a mosque had earlier existed in the place where the *Hanumangarghi* temple is now

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<sup>34</sup> KN Panikkar, ‘A Historical Overview’ in S Gopal (ed), *Anatomy of a Confrontation: The Babri Masjid-Ramjanmabhumii Issue* (Viking, New Delhi 1991) 28-9.

<sup>35</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 12-5.

<sup>36</sup> R Barnett, *North India Between Empires: Awadh, the Mughals, and the British 1720-1801* (Berkley, London 1980) 12-4; Hans Bakker, *Ayodhya: The History of Ayodhya from the 7<sup>th</sup> Century to the Middle of the 18<sup>th</sup> century* (Groningen Oriental Studies, Brussels 1986).

<sup>37</sup> Peter van der Veer, ‘The Construction of Violence and Public Space in Hindu Nationalism’ in PR Brass (ed), *Riots and Pogroms* (Macmillan, London 1996) 161.

<sup>38</sup> KK Sinha, ‘Towards Pluralist Society’ cited in P van der Veer, *Gods on Earth: The Management of Religious Experience and identity in a North Indian Pilgrimage Centre* (Athlone, London 1988) 37.

<sup>39</sup> KN Panikkar, ‘A Historical Overview’ in S Gopal (ed), *Anatomy of a Confrontation* (Viking, Delhi 1992) 31-3.

situated. Hussein led a party of his followers to oust the Hindus from the temple but the occupants of the temple and their supporters outnumbered the Muslims, many of whom were killed, some inside the Babri Masjid itself. Though a communal clash appeared to be impending, the timely intervention of British forces prevented such a situation.

Although this dispute had no direct impact on the Babri Masjid, it paved the way for Hindus to organise themselves to protect their sacred sites and to assert their religious rights.<sup>40</sup> In 1857, the *mahant*<sup>41</sup> took a part of the Babri Masjid compound and constructed a *chabutra*.<sup>42</sup> This was opposed by local Muslims and they made a petition to the local magistrate on 30 November 1858 objecting to the construction of a clay *chabutra*. In 1857, the dispute was resolved by agreeing to raise a wall between the mosque and the *chabutra*. Meanwhile the Babri Masjid was officially registered in 1860 as a place of worship.<sup>43</sup> In 1885, the *mahant* filed a suit to gain the legal title to the land and permission to construct a roof over the *chabutra* to protect it from the vagaries of nature. This was the first legal suit filed by Hindus within the first 350 years of the Babri Masjid's existence.<sup>44</sup> The suit was dismissed.

After the legal battle however, there seems to be no evidence of further claims or counter-claims until 1934 when a riot broke out near Babri Masjid owing to the slaughter of a cow in the village of *Shajahanpur*, near Ayodhya, on 27 March 1934 on the eve of *Bakr-Id*, a major Muslim festival. It should be noted, however, that this riot was unconnected with the claims concerning the birth-place of Ram. During the riots, several Muslim houses, and eventually the Babri Masjid came under attack.<sup>45</sup>

Subsequently, there arose a dispute between the two major factions of Muslims, *Shia* and *Sunni*, regarding the ownership of the Babri Masjid. The civil judge of Faizabad in a regular suit No 29 of 1945, authenticated that although the Masjid was used by *Shia* and

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<sup>40</sup> Ibid 32.

<sup>41</sup> *Mahant* means a Hindu priest belonging to certain Hindu Priests organisations.

<sup>42</sup> A *Chabutra* is a raised platform to keep the idols of Hindu gods for worship.

<sup>43</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 181.

<sup>44</sup> SK Tripathi, 'One Hundred Years of Litigation' in AA Engineer (ed), *Babri Masjid/Ramjanmabhoomi Controversy* (Ajanta, New Delhi 1990) 17.

<sup>45</sup> Ibid 19.

*Sunni* sects of Muslims, it was to be owned and managed by the Sunni Central Board of Waqf, UP,<sup>46</sup> which will be dealt with later.

Two pertinent points are to be noted at this point of the case study. Firstly, the dispute was resolved purely as an internal, Islamic, dispute. There was no strong intervention – either legally or politically – by Hindus claiming control of the site. Not only was Ayodhya a local dispute in this period, but it was not exclusively an inter-religious dispute, even at the local level. Secondly, this internal dispute was speedily resolved by the courts, in marked contrast to the later dispute that evolved into a national, inter-communal, flashpoint.

### **3.2.6. Inter-Religious dispute: 1947-1992**

When India became independent, the most populous and biggest province was the Northern Province which later became the state of Uttar Pradesh, where Ayodhya is located. During the first provincial election, the Congress party won the majority of seats and formed the government.

On 22 December 1949, a few members of the Hindu majority community from Ayodhya placed the idols of *Rama* and others inside the Babri Masjid, after breaking the locks of the gate. This created tension between the two communities and subsequently the Masjid was locked, denying entry to both Muslims and Hindus. Shortly thereafter, suits were filed on behalf of the Hindus for worship of the Hindu deity, which was permitted by the court through an interim injunction. When the matter was before the court, the initial tension receded.

Until 1970, religious riots were not a significant element in Indian life. In 1971, Indira Gandhi won a landslide victory in the parliamentary elections. For the previous few years, the country was not doing well in terms of economic growth and social unrest was prevalent in many states. The opposition parties intensified their protests against the ruling party. As an immediate reason, on 12 June 1975, Justice Jagmogan Lal Sinha voided the Prime Minister's election because she was guilty of 'corrupt practices'.<sup>47</sup> Indira Gandhi,

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<sup>46</sup> Judgement of Civil Judge, Faizabad, dated 30 March 1946 in Suit no 29 of 1945.

<sup>47</sup> G Austin, *Working a Democratic Constitution: The Indian Experience* (OUP, New Delhi 1999) 298-309.

then Prime Minister declared a state of emergency<sup>48</sup> on 26 June 1975 on the grounds that the security of India was threatened by internal disturbances. It was lifted on 18 January 1977 and was followed by general elections for Parliament in March 1977 which resulted in a non-Congress coalition government coming to power in New Delhi for the first time. The election defeat led Indira to turn to religious issues, rather than rely upon her previous staunch secularism, to increase her level of support. As Vanaik noted, 'after the Bangladesh war, Indira made more conscious efforts to woo the 'Hindu vote' by much publicized visits to temples, to talk of the rights and fears of the 'majority community''.<sup>49</sup> The non-Congress government could not complete its term due to inner strife between various alliance partners, especially with the Hindu nationalist party *Bharathiya Jana Sangh*, which subsequently became BJP.<sup>50</sup> In 1980 Indira Gandhi became Prime Minister once again. But most of her former secular values were replaced by religious sentiments.<sup>51</sup>

In May 1983, D.D. Khanna, a former minister in the Congress government of UP, wrote to Indira Gandhi, then Prime Minister of India, demanding the restoration of the temples at the places Ayodhya, Kasi<sup>52</sup> and Mathura,<sup>53</sup> allegedly destroyed by Muslims where three famous mosques exist.<sup>54</sup> At about the same time, the *Vishwa Hindu Parishad* (VHP)<sup>55</sup> took

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<sup>48</sup> The Indian Constitution permits the President to impose emergency in three situations. Articles 352-360 of the Indian Constitution delineate when and how the President can impose emergencies. Three types of emergency include: (a) war or external aggression (351-354), (b) internal disturbance or failure of constitutional democracy in a State (355-359), and (c) financial emergencies (360). Perhaps the most controversial and frequently used in this context is Article 356, which confers powers on the President to dismiss a State government if he/she is satisfied 'on receipt of a report from the Governor of a State or otherwise' that there is a breakdown of constitutional machinery in the State. During the emergency, the State's legislative powers will be exercised by the Parliament. By declaring emergency, the President can assume all of the executive powers of that State, and may also suspend any or all parts of the Constitution applicable to that State except those pertaining to the High Court.

<sup>49</sup> A Vanaik, 'Communalism and Our Foreign Policy' (October 1990) Seminar (No 374) 18.

<sup>50</sup> In 1951, a Hindu political party, *Bharathiya Jana Sangh* (BJS), came into being with close ideological linkages with the RSS. It means 'Indian People's Union'. It was launched to challenge the secular ideology of Congress. In the first five Parliamentary elections held in 1952, 1957, 1962, 1967 and 1971 the party's popular votes never reached two-digit percentage points. In 1977 elections, it allied with other non-Congress parties and shared the power in the Union government. PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 82-6.

<sup>51</sup> Ibid 83-4.

<sup>52</sup> For *Saivists*, those who worship Lord Siva, Kasi is a very important sacred site.

<sup>53</sup> In *Vaishnavism*, Lord Vishnu is the major God who is believed to have taken nine incarnations and the tenth one is yet to come and expected at the end of the present age. One of the important incarnations is *Krishna* and Mathura is a significant sacred site attached to *Krishna*.

<sup>54</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 27.

up the *Ramjanmabhumi* issue to organize the Hindu public in favour of a Ram temple. Subsequently, on 27 July 1984, a Hindu organization,<sup>56</sup> mainly controlled by the VHP, was formed with the sole aim of liberating Ram's birthplace (*Ram Janmastan*) in Ayodhya. From the moment of its creation, the organisation relentlessly worked to propagate the liberation of the *Ram Janmastan* site from the Muslims. On 15 October 1984 a *ratha*, (a vehicle converted in the form of a chariot), resumed its tour of the main UP towns in order to mobilize public opinion and administer the *Ram Janmastan* liberation pledge to the general public.

Seeing no tangible result from this, the Hindu nationalist forces then gave a deadline to the government, resolving that if the locks in the mosque placed after the court orders in 1950 were not removed by 6 March 1986, then 'open the lock', agitation would turn into 'break the lock' agitation. Meantime, in order to lend active support to the movement, the VHP created a volunteer corps named *Bajrang Dal* with the motto of 'Rest not before Ram's work is done'.<sup>57</sup> On 14 October 1984, VHP passed a resolution at Lucknow<sup>58</sup> which demanded that the government immediately hand over all the mosques which stood on destroyed Hindu temples.<sup>59</sup>

In a sudden development, the Prime Minister, Indira Gandhi, was assassinated by Sikh militants in 1984,<sup>60</sup> and her son, Rajiv Gandhi, was made Prime Minister of India. At this

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<sup>55</sup> The *Vishwa Hindu Parishad* (VHP) was established in 29/30 August 1964 under the auspices of the RSS as a reaction to the activities of the Christian Missionaries. See, SS Apte, 'Why Vishwa Hindu Parishad' *Organiser* (Diwali Special Issue, New Delhi 1964) 15. <<http://www.vhp.org/>> accessed 12 March 2006.

<sup>56</sup> *Sri Ramjanmabhumi Mukti Yagna Samiti*, (Ramjanmabhumi Liberation Struggle Committee) a Hindu Organisation was formed on 27 July 1984, with the sole aim of liberating the disputed site from Muslims. SP Udayakumar, *Historicizing Myth and Mythologizing History: The Violent 'Ram Temple' Drama* in SP Udayakumar (ed), *Handcuffed to History: Narratives, pathologies, and Violence in South Asia* (Praeger, Westport 2001) 83.

<sup>57</sup> A *Vishwa Hindu Parishad* UP (East) Publication 1985 cited in AA Engineer (ed), *Babri-Masjid-Ramjanam Bhoomi Controversy* (Ajanta, Delhi 1990) 230.

<sup>58</sup> Lucknow is the Capital of the State of UP.

<sup>59</sup> Ashok Singhal, 'The Struggle for Liberation of Sri Ram -Janamabhoomi'

<[http://www.vhp.org/englishsite/e.Special\\_Movements/dRanjanambhumi%20Muti/thestruggle.htm](http://www.vhp.org/englishsite/e.Special_Movements/dRanjanambhumi%20Muti/thestruggle.htm)> accessed 10 October 2006.

<sup>60</sup> The assassination of Indira Gandhi was associated with religious disputes between the minority Sikh religious community and the majority Hindu community. For Sikhs all over the world, the Golden Temple, situated at Amritsar in the state of Punjab, is the most significant sacred site. In the early 1980s, militants under the leadership of Sant Bindranwale took refuge in the Golden Temple and carried out attacks on Hindus in the state. Indira Gandhi ordered the Indian military to flush out Sikh militants from the sacred site and accordingly they attacked the Golden Temple and its precincts on 5 June 1984. In this process, tanks and artillery were used to destroy a sacred site of the Sikh religious community. Later, that year Indira Gandhi

time the VHP intensified its protests and a district court order led to the opening of the locks of the Babri Masjid to the Hindus in March 1986,<sup>61</sup> whereas entry to the Muslims continued to be denied. Following the unlocking of the Masjid and the establishment of the Babri Masjid Action Committee (BMAC),<sup>62</sup> the frequency and intensity of protests by a section of the Muslim community increased, the dispute escalated and moved to Delhi, beyond the borders of UP.

In early 1987, during a rally, some Muslim leaders in Delhi protested against the unlocking of the Babri Masjid, and demanded their right to pray there. At the same time the VHP organized *rath yatras* and expanded their campaign over large parts of the country. On the one hand, many petitions were filed in the courts against the order of unlocking, which opened the mosque for Hindus to worship, and on the other hand, Muslim organizations intensified their protests throughout India.

After the 1989 Parliamentary elections, the *Janatha Dal Party* formed the government with the outside support of the *Bharathiya Janatha Party* (BJP) and V.P. Singh became Prime Minister. It is significant that the support of the BJP was crucial for the survival of the *Janatha Dal* Government.

The *Ramjanmabhumi* issue moved centre stage in the political battle for power and was pushed up to a feverish pitch by L.K. Advani, the BJP president,<sup>63</sup> after the policy of job reservations for backward castes was announced by V.P. Singh. The *Sangh Parivar* foresaw the danger it would cause to the Hindu electoral support they had nurtured so far.

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was assassinated by her Sikh bodyguards. In the subsequent riots nearly three thousand Sikhs were massacred and several million dollars worth of properties were destroyed including sacred sites belonging to the Sikh community. Patwant Singh, 'The Sikhs and the Challenge of the Eighties' in Joseph T. O'Connell, Milton Israel and Willard G. Oxtoby (eds), *Sikh History and Religion in the Twentieth Century* (University of Toronto Centre for South Asian Studies, Toronto 1988) 414-16.

<sup>61</sup> Text to n 128, above.

<sup>62</sup> In February 1986, followed by the opening of the locks, prominent Muslim leaders decided to form the Babri Masjid Action Committee to protect the Babri Masjid. 'DATELINE: Babri Masjid/Ram-Janam-Bhoomi Dispute' <<http://muslimsonline.com/babri/babridat.htm>> accessed 15 March 2007.

<sup>63</sup> LK Advani became the president of BJP in 1986. He reaffirmed that India should be a Hindu State. Along with other *Sangh Parivar* organisations, BJP adopted various slogans which highlighted Hindu Nationalism. So the controversy over the ownership of the Babri Mosque was a godsend for the BJP. PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 89-92.

L.K. Advani launched a *rath yatra*<sup>64</sup> across the country, to end at Ayodhya, where building work (*kar seva*) was to take place to build a Ram temple in place of the Babri Masjid. The public order situation in certain areas of the country deteriorated, predominantly along the route of the *Rath Yatra*. At the end of October 1990, demands to stop the *yatra* were strongly voiced within Parliament. When Advani was arrested in Bihar, a clash between BJP supporters and the police took place on the *Sarayu* river bridge in Ayodhya. The government had to use force to clear the Babri Masjid area and some *kar sevaks* were killed and many were injured.<sup>65</sup> The ashes of the *kar sevaks* who were killed were sent in twenty-two urns to different parts of the country by the *Sangh Parivar* which created more tension, and several places witnessed riots and violence.<sup>66</sup> When Advani was arrested, BJP withdrew its support for the government resulting in the failure of V.P. Singh's government to retain its majority in Parliament. As a result, the government lost its power.

Elections were called in June 1991 for the *Lok Sabha*, and also for the UP Assembly. After the elections, the Congress party emerged as the single largest party in the Parliament. Although it did not command a majority, it formed the government under the leadership of Narashima Rao since Rajiv Gandhi was assassinated during the election campaign. The BJP gained the majority of seats and formed the government in UP state. This BJP leadership at UP played a crucial role in the Ayodhya Dispute, especially during the demolition of the Babri Masjid on the 6 December 1992.

### 3.2.7. From demolition to the present day: 1992-

The *Sangh Parivar* declared 6 December as the day for beginning to build (*Kar seva*)<sup>67</sup> the new Ram temple. From 1 December 1992 *kar sevaks* from many parts of India gathered in Ayodhya. It was estimated that on the demolition day, there were more than two hundred thousand *kar sevaks* ready to perform construction work. On 6 December 1992, at about

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<sup>64</sup> *Rath Yatra* means 'travel by a chariot'. During *Rath Yatra*, then BJP President L.K. Advani travelled in a Toyota car converted into a chariot. See, PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 94.

<sup>65</sup> DS Bulet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 195-99.

<sup>66</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 12.

<sup>67</sup> *Kar seva* means 'voluntary work at temples'. A *kar sevak* means 'a volunteer who has dedicated to and actively supported the building of Ram's Temple at Ayodhya.



11.00 am, as people gathered in front of the platform adjacent to the disputed area to listen to speeches, *kar sevaks* breached the cordon formed by the RSS volunteers, entered the disputed area, and began stoning the mosque as well as the police guarding it. Ropes were used to clamber on to the domes, which were then dismantled with iron rods. Journalists who took pictures were attacked. The PAC, the para-military unit from the UP state, which was stationed in the immediate vicinity of the Babri Masjid, failed to intervene and the Central Reserve Police Force (CRPF), which was originally stationed inside, quickly left the scene. Around 12.45 pm, the idols, collection boxes, and the portraits of Ram and others were carried from the building. The left dome caved in at 2.55 pm, the right collapsed at 4.35 pm and the central one fifteen minutes later. Before that, the Muslims were attacked in Ayodhya town and many houses were set ablaze.<sup>68</sup>

The demolition of the Babri Masjid led to the resignation of the UP state government and the imposition of President's rule under Article 356. The neighbouring three BJP state governments were dismissed on the basis of abetting the crime of demolition of the Masjid.<sup>69</sup> During the demolition of the Masjid, at 17.15 hours, a Ram idol was installed in the debris of the demolished shrine. On 7 December from 01.00 hours until 10.00 hours the debris was cleared and a small makeshift temple was constructed where the idols were installed.<sup>70</sup> Subsequently, on the morning of 8 December the site came under the para-military forces and no *kar sevaks* were allowed to stay inside the temple.

The makeshift temple contained idols of Ram and his wife Sita and worship was conducted in the make-shift temple with the permission of the High Court, Allahabad. The Hindu communal organizations RSS, VHP and *Bajrang Dal* were banned <sup>71</sup>along with two

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<sup>68</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 455. For detailed demolition narratives, AK Sahay, *The Republic Besmirched* (SAHMAT, New Delhi 1993).

<sup>69</sup> PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 99.

<sup>70</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 455.

<sup>71</sup> Four organizations – the RSS, the VHP, the *Islamic Sevak Sangh* and the *Bajrang Dal* – were banned under the Unlawful Activities (Prevention) Act 1967 (Act No 37 of 1967) for 'promoting disharmony of feelings of enmity, hatred or ill-will between different religious communities', as was the *Jamaat-i-Islami* for preaching secession. See, DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 214.

Muslim organisations *Jamait-e-Islami* and *Islamic Sevak Sangh*.<sup>72</sup> On 13 December 1992, the Central Government ordered a CBI<sup>73</sup> inquiry relating to the demolition. A Notification<sup>74</sup> was issued by the union government for setting up a judicial commission<sup>75</sup> under a High Court judge to inquire into the circumstances relating to the events in Ayodhya on 6 December 1992, and Justice Liberhan was appointed as the head of the Commission. The inquiry has not finished after fourteen years.

Several criminal suits were filed in the courts after the demolition which will be dealt with in detail in the ensuing litigation section. On 7 January 1993 the union government acquired sixty-seven acres of land in and around the demolished Babri Masjid complex through the Acquisition of Certain Areas at Ayodhya Act 1993. The government set up a trust for the construction of the temple which failed due to political and religious differences. A twenty one member 'apolitical' trust was then established which was called '*Ramjanmabhumi Ramalaya Nyas*'.<sup>76</sup>

On 7 January 1993, the President of India requested the Supreme Court to answer the Special Reference under Article 143(1) of the Constitution of India. The content of the Reference was the seeking of the opinion of the Supreme Court as to whether a Hindu temple existed prior to the construction of the Babri Masjid. On 24 October 1994, the Supreme Court unanimously declined<sup>77</sup> to give its opinion on the one-point Presidential Reference on the Ayodhya issue<sup>78</sup> and this will be analysed in a later section.

In the 1996 Parliamentary elections, the Congress party failed to secure a majority, while due to the Babri Masjid/Ram temple dispute, the BJP gained more seats and emerged as the single largest party though it was short of a majority.<sup>79</sup> BJP leader, Vajpayee, became the

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<sup>72</sup> M Godbole, *Unfinished Innings: Recollections and Reflections of a Civil Servant* (Orient Longman, New Delhi 1996) 394.

<sup>73</sup> Central Bureau of Investigation (CBI) is the federal investigative agency which comes under the Ministry of Home Affairs, New Delhi.

<sup>74</sup> Notification from Ministry of Home Affairs, No N-71013/27/92/AY-1 (New Delhi 16 December 1992).

<sup>75</sup> Under the Commission of Inquiry Act, 1952.

<sup>76</sup> PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 264.

<sup>77</sup> See n 170, above.

<sup>78</sup> Special Correspondent, 'On Ayodhya' *The Hindu* (New Delhi, 25 October 1994) 1.

<sup>79</sup> PK Kantha, 'General Elections 1996: BJP Politics – Looking Beyond the Impasse' (29 November 1997) *Economic and Political Weekly* 3096. For more details, SI Wilkinson, *Votes and Violence: Electoral Competition and Communal Riots in India* (CUP, Cambridge 2004).

Prime Minister and many of those accused in the demolition of the Babri Masjid case became union Cabinet ministers.

However, within thirteen days of taking office the BJP government resigned after a defeat in a no-confidence motion.<sup>80</sup> In the 1998 general elections, the BJP put forward the construction of a Ram temple at the site of the demolished Babri Masjid<sup>81</sup> as its main campaign promise and gained more seats though they once again fell short of a majority. Vajpayee became Prime Minister for the second time as the head of the single largest party in Parliament. This BJP government too did not last long due to its inner conflicts and its alliance partners withdrew their support after thirteen months in power, resulting in another general election.

In the 1999 general elections, the BJP campaigned for a clear mandate from the people with a comfortable majority in Parliament so that it could fulfil its electoral promise of constructing a Ram temple at Ayodhya. Despite the hard work done by BJP, it could win only 180 seats in a House of 545 members to become the single largest party. With its alliance partners it achieved a majority and BJP leader, Vajpayee, became Prime Minister for the third time and L.K. Advani, one of the main accused in the demolition case, became Deputy Prime Minister. However, this time the BJP completed its five year term and an election was announced in 2004. Once again BJP went to the people with the appeal for a majority to fulfil its electoral promise of constructing the Ram temple at Ayodhya. In an unexpected turn of events, the Congress Party emerged as the single largest party and Manmohan Singh became the Prime Minister with the outside support of left wing parties coming together on the secular platform.

Two later incidents need to be mentioned here relating to the Ayodhya dispute. Firstly, in 2002, the VHP announced a deadline for the construction of the Ram temple for which the Supreme Court clearly denied permission and directed the government to maintain the status quo.<sup>82</sup> In a subsequent move, the High Court at Lucknow, on 5 March 2003 ordered

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<sup>80</sup> S Trivedi, '1995-1997: A Chronology' in M Bouton and P Oldenburg (eds), *India Briefing: A Transformative Fifty years* (Asia Society, New York 1999) 241-94.

<sup>81</sup> From BJP Election Manifesto 1998. Chapter 2 'Our National Identity' states that 'the BJP is committed to facilitate the construction of a magnificent *Shri Ram Mandir* at *Ram Janmasthan* in Ayodhya where a makeshift temple already exists'. <<http://www.bjp.org/manifestes/manifestes.htm>> accessed 10 March 2006.

<sup>82</sup> Order in Writ petition (Civil) No 160/2002, dated 13 March 2002.

archaeological<sup>83</sup> excavation to verify whether any Hindu temple existed before the Babri Masjid was built.

Secondly, in February 2002, some Ram devotees returning from Ayodhya in a train were burnt alive when some men torched one of the train compartments. This incident led to massive riots in the state of Gujarat, governed by the BJP, and within three days more than 2000 people, mainly from the minority Muslim community were killed and hundreds of rapes were reported.<sup>84</sup>

This overview summarises the development of the Ayodhya dispute in the Indian political context and shows how the suits which began in 1950 were still pending before the courts for fifty-six years. Also, it can be seen how this dispute was used by the religious militants for upsetting the social fabric of democratic India.

### **3.3. Babri Masjid and the Indian state**

This section examines the interaction between the various state actors in the Ayodhya dispute, it analyses how the governments, both union and state, and the judiciary handled the dispute and covers all the litigations from 1885 to 2007.

#### **3.3.1. Litigation and state action from before Independence until 1947**

After the 1855 clash,<sup>85</sup> Hindus continued to worship in a small clay *chabutra* outside the Babri Masjid in spite of Muslim objections. Ayodhya at that time contained hundreds of Hindu temples and pilgrims used to visit as many as possible during their visit.

The first legal battle started when the priest of *Janmasthan*<sup>86</sup> temple, Raghubar Das, filed a petition before the Deputy Commissioner of Faizabad in 1883 seeking permission to erect a

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<sup>83</sup> It is relevant to refer to the order of the court dated 5 March 2003, archaeological excavations at the site of the Babri Masjid had been conducted from 12 March to 7 August 2003 and the report was filed on 22 August 2003. Four sets of objections were filed by the Muslims against the aforesaid ASI (Archaeological Survey of India) report and after hearing lengthy arguments in this respect, the court passed an order on 3 February 2005. The court declared that the ASI report as well as objections against the report would be considered at the time of final decision of the case, in the light of the evidence which had already been produced by the parties or which might be produced.

<sup>84</sup> AA Engineer, *Communal Riots After Independence: A Comprehensive Account* (Shipra, New Delhi 2004) 188.

<sup>85</sup> See n 39, below.

small temple over the *chabutra*, of which he claimed the ownership, to protect the idols and the devotees from the vagaries of nature. Permission was denied. Consequently, Raghubar Das filed a suit at the Faizabad sub-judge's court seeking permission to build a roof over the *chabutra*.<sup>87</sup> The plaintiff's contention was that the *chabutra* was in his possession as a *Mahant* of the *Janmasthan* and that it was necessary to construct a temple for him and for the worshippers.<sup>88</sup> However, the significant factor to consider is that the plea was not against the mosque, but for the erection of a wall and sheds to save the idols from the vagaries of nature. The sub-judge *Hari Kishan*, however, on December 24 dismissed the plea, saying that the awarding of permission to construct the temple at this juncture would be laying the foundation for riots and murders between the Hindus and the Muslims.<sup>89</sup> However, to decide the issue of ownership, the judge decided in favour of the plaintiff Raghubar Das.

Against the above order, Raghubar Das filed an appeal<sup>90</sup> in the District court which was dismissed by the District Judge Col. F.E.A. Chamier. In his dismissal order, the judge recorded the reasons as follows. Firstly, it was unfortunate that a Masjid had been built on land specially held sacred by the Hindus, but as the event occurred 356 years ago it was too late to remedy the grievance. Secondly, any change could cause more harm and derangement of order than benefit, hence the maintenance of status quo was ordered. Finally, the order of the sub-judge declaring the right of property to rest in plaintiff was cancelled since there were no documents to support the claim of the *mahant* as its proprietor.<sup>91</sup>

A subsequent second appeal<sup>92</sup> was also finally dismissed by the Judicial Commissioner of *Avadh*, W Young, who had the power of the High Court. In his judgement dated 1

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<sup>86</sup> *Janmasthan* means 'birth place'.

<sup>87</sup> Para 4 from the *Plaint of Mahant Raghubar Das* dated 29 January 1885 cited in AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 175-76.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Mahant Raghubar Das, Mahant of Janmasthan, Ayodhya v The Secretary of State for India in Council*, *Plaint* dated 29 January 1885 - no 61/280 of 1885 cited in MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 55-61.

<sup>90</sup> Civil Appeal no 27 of 1886 instituted on 9 January 1886.

<sup>91</sup> Judgement by FEA Chamier, District Judge, Faizabad dated 26 March 1886.

<sup>92</sup> Second Civil Appeal no 122 of 1886 cited in AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 186-88

November 1886, the Judicial Commissioner noted that it was a very wise and proper procedure on the part of the executive and the Civil Courts to have promptly dismissed the plaintiff's claim. The pleas on appeal were wholly unsupported by the facts in the case or by any arguments that appear to be weighty. In addition, there was nothing whatever on the record to show that the plaintiff was in any sense the proprietor of the land in question. Hence the appeal was dismissed.<sup>93</sup>

With the above dismissal, the first litigation in the nineteenth century between Hindus and Muslims came to an end. By this time it was clearly established that the property rights claimed by the *mahant* were not sustainable by law. Though the right to worship was allowed near the *chabutra*, both parties were requested by the court of law to maintain the 'status quo'. This shows that the courts had acted swiftly to dispense justice which thus prevented further riots or violence in Ayodhya based on the place of worship.

In 1943, the Commissioner of Waqfs set up an enquiry, under section 4 of Uttar Pradesh Muslim Waqfs Act,<sup>94</sup> into the ownership of the Babri Masjid. The enquiry found that the Babri Masjid was built in 1528 by Babar who was a *Sunni* Muslim.<sup>95</sup> Later in a suit<sup>96</sup> between the *Shia* and *Sunni* communities, the Civil Judge of Faizabad confirmed the fact that the Babri Masjid was in the use of *Shia* and *Sunni* sects of the Muslims. However, the Civil Judge held it to be a Sunni Waqf property.<sup>97</sup>

The Judge came to this conclusion based on the following evidence. Firstly, there was evidence found in the history of the mosque in the Faizabad Gazetteer, of the settlement report which affirmed the visit of Babar to Ayodhya in 1528 AD. Secondly, one of the inscriptions in the mosque clearly stated that Babar had ordered the building of the mosque as stated in the Gazetteer and the settlement report. Thirdly, records prove that Babar had made a grant for the upkeep of the mosque. Finally, there is the admitted fact that within living memory of the imams, the muezzins in the mosque have been *Sunnis* and they were

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<sup>93</sup> Judgement by Judicial Commissioner W Young, Oudh, dated 1 November 1886 in no 1221 K/1886 cited in AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 188.

<sup>94</sup> UP Muslim Waqfs Act (Act No XIII of 1936).

<sup>95</sup> The report of Faizabad District *Waqf* Commissioner, dated 8 February 1941.

<sup>96</sup> Suit no 29 of 1945.

<sup>97</sup> *Shia Central Board of UP Waqf v Sunni Central Board of UP Waqf* (1945) Regular Suit no 29: 1945.

paid by *Mutttawallis* who had always been Shiites. Based on those reasons, the judge declared Babri Masjid as a *Sunni* Waqf property.

From the above discussion, it became clear that from 1885 until 1946, the suits were settled as soon as possible in the courts without delay. The executive authorities followed the court orders effectively. The speedy remedy prevented further riots based on Babri Masjid disputes.

### 3.3.2. Litigation and State Action: 1947-1985

In 1949, the controversy took a new turn with the placing of idols of Ram and others inside the mosque which had been used by the Muslims for worship for the past 421 years that forms the nucleus of the whole dispute. During the final months of 1949 a group of *sadhus* occupied a Muslim cemetery near the mosque, and ignited sacred fires to emphasize their claim that the area was originally a Hindu religious site.<sup>98</sup> Some days later, however, idols of Ram, Lakshman,<sup>99</sup> and Sita,<sup>100</sup> were discovered inside the mosque which Hindus claimed was a miraculous event.<sup>101</sup>

There are multiple versions as to how this occurred. However, Gould observes that 'this miracle story created a local sensation. Hindus and Muslims flocked to the *Janmasthan*, the former to bear witness to the miracle, the latter to defend the Babri Masjid against desecration and seizure by the Hindus'.<sup>102</sup> However, the District Magistrate K.K. Nayar seems not to have accepted this miracle story in his radio message.<sup>103</sup>

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<sup>98</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 93.

<sup>99</sup> Lakshman is brother of Hindu god Ram.

<sup>100</sup> Sita is wife of Hindu god Ram.

<sup>101</sup> However, the First Information Report stated: At about 9.00 in the morning around fifty to sixty persons entered the Babri Masjid after breaking open the locks.<sup>101</sup> They did not care when Hans Raj, the constable No 70, stopped them from entering. Provincial Armed Constabulary (PAC) guards were called for help but by then the mob had already entered the *masjid*. Regarding the offenders, Mata Prasad points out that 'Ram Das, Shukla Das, Sudharsan Das with 50 to 60 persons desecrated the mosque by trespassing the mosque through rioting and placing idols in it. AG Noorani, 'Legal Aspects to the Issue' in S Gopal (ed), *Anatomy of a Confrontation: The Babri Masjid-Ramjanmabhumii Issue* (Viking, New Delhi 1991) 70-1.

<sup>102</sup> HA Gould, *Grass Roots Politics in India: A Century of Political Evolution in Faizabad District* (IBH Publishing Co, Oxford 1994) 181-96.

<sup>103</sup> A Radio Message sent at 10.30 am on 23<sup>rd</sup> December 1949, by District Magistrate K.K. Nayar to the Chief Minister, Chief Secretary and Home Secretary stated that 'a few Hindus entered Babri Mosque at night when the Mosque was deserted and installed a deity there. A Police picket of 15 persons was on duty at night but

When the dispute escalated local tension, additional city Magistrate, Markandey Singh, ordered the gates of Babri Masjid to be locked<sup>104</sup> and prohibited both communities from its use. The order stated:

I order to lock the building after being fully satisfied from information received from police sources and from other credible sources that a dispute between Hindus and Muslims of Ayodhya over the question of rights of proprietorship and worship in the building claimed variously as Babri Masjid and *Janmabhumi Mandir* (temple), within the local limits of my jurisdiction, is likely to lead to a breach of the peace.<sup>105</sup>

The Magistrate appointed Priya Dutt Ram, Chairman, Municipal Board, Faizabad-cum-Ayodhya, as 'receiver' to arrange for the care of the property in dispute on 29 December 1949. The receiver took charge of the disputed property on 5 January 1950 and submitted a scheme as specified in the additional city Magistrate's order.<sup>106</sup>

After the mosque was attached<sup>107</sup> and a receiver was appointed, the first suit was filed on 16 January 1950 by *Gopal Singh Visharad*, a *mahant* from Ayodhya. The Plaintiffs<sup>108</sup>

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did not act. Situation is under control. MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 51.

<sup>104</sup> Criminal Procedure Code 1973 (CrPC) (Act No 2 of 1974) s 145 contains an entire chapter on 'disputes as to immovable property'. It reads: (1) whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute, and further requiring them to put in such documents, or to adduce by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims.

Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date,

Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section

<sup>105</sup> SK Tripathi 'One Hundred Years of Litigation' in AA Engineer (ed), *Babri Masjid/Ramjanmabhoomi Controversy* (Ajanta, New Delhi 1990) 20-1.

<sup>106</sup> Ibid 22.

<sup>107</sup> CrPC (n 103) s 146: Power to attach subject of dispute and to appoint receiver - (1) If the Magistrate at any time after making the order under sub-section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking



claimed two remedies which included the right to *darshan*<sup>109</sup> and worship without any interference from the defendants, and a permanent prohibitory order against the defendants and their legal representatives not to remove the idols from the *Janmastan*. The Civil Judge N.N. Chadha passed an interim injunction order to allow worship by a Hindu priest and the non-removal of the idols. Once again the order dated 16 January 1950 was modified on 19 January 1950.<sup>110</sup>

The new Deputy Commissioner of Faizabad, J.N. Ugra, filed a reply in title suit No 2 of 1950 in which he denied that the plaintiff was entitled to get any relief as prayed for by him and further stated that the property in suit was known as Babri Masjid and it had been used for the purpose of worship by the Muslims for a long period. It was not in use as a Ram temple.<sup>111</sup> He categorically stated in his written statement that 'on the night of the 22 December 1949 the idols of Ram and others were surreptitiously and wrongly put inside it'.<sup>112</sup>

Later the interim injunction order was confirmed by the Civil Judge, Faizabad in his order dated 3 March 1951. He ordered that the interim injunction remain in force until the suit be disposed of. This order of interim injunction may not be legally tenable. The reason is, in his order, the Civil Judge made mention of affidavits of certain Muslim residents of Ayodhya. The arguments on merits were heard and concluded by the court on 17 February 1951 and the interim order was passed on 3 March 1951. In the intervening period, the judge allowed those 'affidavits' to be filed by unknown people. In addition, no opportunity

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after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908: Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate- (a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him; (b) may make such other incidental or consequential orders as may be just.

<sup>108</sup> *Gopal Singh Visharad and others v Zahoor Ahmad and others*, Suit no 2 of 1950.

<sup>109</sup> *Darshan* means 'to see' the idols of Hindu gods installed in temples as part of worship.

<sup>110</sup> This order, dated on 19 January 1950, was passed by Bir Singh, Civil Judge, Faizabad. The order dated 16 January 1950 was modified on 19 January 1950 as follows: The opposite parties are hereby restrained by means of temporary injunction to restrain from removing the idols in question from the site in dispute and from interfering with *puja* etc as 'at present carried on'. The order dated 16 January 1950 stands modified accordingly.

<sup>111</sup> Para 12 from the written statement of Deputy Commissioner *Ugra* in the Court of *Munsif Sadar*, Faizabad in Suit no 2 of 1950.

<sup>112</sup> Para 13 from the written statement of Deputy Commissioner *Ugra* in the Court of *Munsif Sadar*, Faizabad in Suit no 2 of 1950. SK Tripathi, 'One Hundred Years of Litigation' in AA Engineer (ed), *Babri Masjid/Ramjanmabhoomi Controversy* (Ajanta, New Delhi 1990) 23.

was given to the Muslim defendants or the state to file counter affidavits.<sup>113</sup> Hence, these affidavits were not legally maintainable.

The civil judge confirmed the interim order on three grounds. Firstly, that the existence of the idols and worship was being conducted in a limited way in the mosque. This, coupled with the affidavits, made out a *prima facie* case in favour of the plaintiff. Secondly, vacating the interim injunction would result in depriving the plaintiff of the right to worship claimed by him. And finally, there were other mosques in the area and the local Muslims would not be put into much inconvenience during the pendency of the case.

Against this order, a first appeal was filed in the High Court of Judicature at Allahabad. Chief Justice O.H. Mootham and Justice R. Dayal dismissed the appeal and confirmed the interim injunction, though their order recognised the ‘error’ made by the Civil Judge by placing the reliance on the affidavits. After evaluating the lower court’s decision, the High Court commented that the lower court judge ought not to have treated those documents as evidence without notice to the appellants and affording them an opportunity of filing counter affidavits, and if necessary, of hearing counsel further thereon.<sup>114</sup> However, the High Court observed that granting an interim injunction is a matter of discretion<sup>115</sup> and unless the court is satisfied that the judge has acted in an arbitrary manner it will not interfere with the order which he has made. With that order by the High Court, the suit came back to the Civil Court at Faizabad for disposal.

Meantime, a second suit<sup>116</sup> was filed for the same relief by another Hindu priest called *Paramhansa Ramachandra Das*. On 1 February 1951, the civil judge of Faizabad consolidated the two suits. A third suit<sup>117</sup> was filed on 17 December 1959 in the Court of Civil Judge by *Nirmohi Akhara* (a congregation of Hindu Priests) through its chief priest against the Receiver, *Priya Dutt Ram*, and seven other defendants, including the State of

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<sup>113</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 62.

<sup>114</sup> High Court’s order dated on 26 April 1955 in Suit no 2 of 1950.

<sup>115</sup> Civil Procedure Code 1908 (Act No 5 of 1908) (CPC) s 94(c): ‘in order to prevent the ends of justice being defeated, the court may grant a temporary injunction’.

<sup>116</sup> Suit no 25 of 1950 was filed in the Court of Civil Judge, Faizabad. In this suit, *Paramhansa Ramachandra Das*, who was a priest from *Nirmohi Akhara*, and others were plaintiffs against nine defendants including the State of Uttar Pradesh. Relief claimed were similar to the first suit which included a declaration to entitle the Plaintiff to worship without any check, obstruction or interference, and prohibiting the defendants or their legal representatives not to interfere in exercising his right to worship.

<sup>117</sup> Suit no 26/1959 of the Court of Civil Judge, Faizabad, now registered as Other Original Suit no 3 of 1989 in the High Court.

UP. The relief claimed was the removal of the Receiver from management and charge of the temple of *Ram Janmasthan*, and the delivery of the site to the plaintiffs.

For the first time the Muslims filed a suit in 1961. The Sunni Central Board of Waqfs, UP, filed a suit against *Gopal Singh Visharad* and other plaintiffs in the first suit, for declaration and recovery of possession of the mosque and graveyard after removing the idols and other articles.<sup>118</sup>

In 1964, all the four suits were consolidated<sup>119</sup> and the Waqf suit was made the leading suit. In all these suits a date was fixed for the final hearing, but the death of the Receiver in 1970 created a fresh dispute which paved the way for proliferation of suits. This delayed the final hearing of title suits since the Receiver was one of the main defendants in those suits. This receivership dispute was finally settled by the High Court on 23 July 1987 after pending for twelve years.<sup>120</sup> During these years, the files of the title suits remained before the High Court and in the final order in 1987, the High Court directed the District Judge to dispose of the original suits as early as possible.

### 3.3.3. Litigation and State action 1985-1992

Between 1951 and 1985 Faizabad and Ayodhya remained mostly calm and the dispute was contested through the courts. In 1984, VHP initiated a movement to 'liberate' the *Ram Janmabhumi* and the rebuilding of a magnificent Ram temple at Ayodhya. As the VHP carried out its campaign to open the locks, another issue, the Shah Bano judgement, began to attract the attention of the whole nation. Secular historians like Panikkar, Gopal and especially Engineer<sup>121</sup> allege that it had some influence on subsequent events which heightened the Ayodhya dispute to a new level. According to Neerja Chowdhury,<sup>122</sup> there is

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<sup>118</sup> Regular Suit no 12 of 1961 in the Court of Civil Judge, Faizabad.

<sup>119</sup> Order IV-A of the Civil procedure code 1908, under the title of 'Consolidation of Cases' states: When two or more suits or proceedings are pending in the same Court, and the Court is of opinion that it is expedient in the interest of justice, it may by order direct their joint trial, where upon all such suits and proceedings may be decided upon the evidence in all or any of such suits or proceedings.

<sup>120</sup> From the averments of Writ Petition no 746/86 in the Allahabad High Court. For more details, K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 97-8.

<sup>121</sup> AA Engineer, 'Introduction' in AA Engineer (ed), *The Shah Bano Controversy* (Orient Longman, Hyderabad, India 1987) 1.

<sup>122</sup> Neerja Chowdhury details that there was strong opposition from the All India Muslim Personal Law Board to the *Shah Bano* judgement and that Rajiv Gandhi, then Prime Minister, promised Muslim leaders an

evidence of a connection between the opening of the disputed Babri masjid in Ayodhya and the introduction of the Muslim Women Bill in Parliament. Hence a brief account is given here about this judgement and the subsequent Bill brought by the union government to defeat this judgement.

Shah Bano was married to Mohammad Ahmad Khan, an advocate from the State of Madhya Pradesh in 1932. In 1946, Khan married a second wife and denied Shah Bano her basic amenities. In 1975 Khan drove Shah Bano out of the house. When Shah Bano approached the first class judicial magistrate, Indore, asking for maintenance<sup>123</sup> from her husband at the rate of Rupees 500 per month, Khan divorced Shah Bano by a so-called 'irrevocable' triple *talaq* pronounced in a single breath on 6 November 1978.

Before the Indore Magistrate, and throughout subsequent proceedings, right up to the Supreme Court, Khan insisted that Shah Bano had ceased to be his wife and he was under no obligation to provide maintenance for her beyond what he had already paid her. The magistrate, however, directed Khan to pay 25 rupees<sup>124</sup> per month. Shah Bano appealed to the Madhya Pradesh High Court which increased the amount of maintenance to 179.20 rupees. Against this order, Khan appealed to the Supreme Court where his appeal was dismissed and the High Court judgement was confirmed.

The Shah Bano judgement created a public outcry among the Muslim men. The All India Muslim Personal Law Board (AIMPLB) protested against the judgment and organised Muslims against the union government which created unrest throughout the country. The demonstrations finally came to an end only when the union government under Rajiv Gandhi pre-empted the judgement by introducing the Muslim Women (Protection of Rights on Divorce) Bill on 25 February 1986 which exempted Muslim women from the purview of Sections 125 and 127 of CrPC. Therefore the Muslim women were denied the protection

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ordinance to over-ride the effects of the judgement by the Supreme Court. The Bill was introduced in Parliament on 25 February and became an Act. Thus the Muslim leaders have been silent on the opening of the Babri Masjid, except for sporadic agitations, because they do not want to do anything to jeopardize the Muslim Women's Bill. Neerja Chowdhury, 'Short sighted Move to Appease Communities' *The Statesman* (New Delhi 1 May 1986) cited in AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (Tulika Books, New Delhi 2003) Vol I, 264-66.

<sup>123</sup> CrPC (n 103) s 125.

<sup>124</sup> Rupee is the currency used in India and some other South Asian countries.

of national secular law, and once again from the legal standpoint came under the Muslim personal law.

Perceiving the vulnerability of the Prime Minister, the *Sangh Parivar* intensified its demand for opening the locks in Babri Masjid/Ram Janmabhumi. Ghosh pointed out that the supplanting of the Supreme Court judgement in the Shah Bano case by the Muslim Women's Bill charged the sentiments of the BJP further and it took full advantage of the situation and completely identified itself with the entire pan-Hindu forces'.<sup>125</sup>

Returning from this context to our dispute, a major turning point came on the 25 January 1986, when Umesh Pandey, an advocate from Ayodhya, moved an application<sup>126</sup> in the Magistrate Court of H.S. Dubey, Faizabad, seeking directions that the locks on the doors of the *Ramjanmabhumi* temple should be opened for Hindus to allow free offering of prayers. But the Magistrate did not pass any order because the main suit for the title was pending in the High Court. Expressing his inability to dispose of the application, he felt he could not pass an order without the records of the main suit.<sup>127</sup>

Umesh Pandey, who was not a party in any main suits, filed an appeal<sup>128</sup>, against the order of the Magistrate in the Court of the District Judge, Faizabad, in which he stated that the order amounted to a refusal of his prayer. His prayer was 'for allowing free entry into the building for worship and *darshan*' which was restricted by the district authorities as per the interim order passed in 1950.

The appeal was admitted by the District Judge K.M. Pandey on 31 January 1986 and disallowed the applications for impleadment of Muslims and allowed Umesh Pandey's plea for the opening of the locks. In his order, Judge K.M. Pandey stated:

After having heard the parties it is clear that the members of the other community, namely Muslims, are not going to be affected by any stretch of imagination if the locks of the gates are opened and the idols inside the premises are allowed to be seen and worshipped by pilgrims and devotees. It is an undisputed fact that the premises are presently in the Court's possession and for the last 35 years Hindus have an unrestricted right of worship as a result of the Court orders

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<sup>125</sup> PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 90.

<sup>126</sup> Application 422/C in Regular Suit no 2 of 1950.

<sup>127</sup> Order dated 28 January 1986.

<sup>128</sup> Civil Appeal no 66/198, dated on 30 January 1986. The appellant included only the State Government and other district authorities as respondents in the appeal, and not any Muslim defendants including the Sunni Central Board of Waqfs, since he alleged that he did not want any relief against them.

of 1950 and 1951 (19.1.50 and 3.3.51). The District Magistrate has stated before me today that members of the Muslim community are not allowed to offer any prayer at the disputed site. If this is the state of affairs, then there is no occasion for law and order problem arising as a result of the removal of locks. It is absolutely an affair inside the premises.<sup>129</sup>

Based on the above reasons, and the assurances from the DM and the SSP that law and order could be maintained, the judge directed the defendants to open the locks and not to impose any restriction or hurdle in the *darshan* and worship of the applicant and other members of the Hindu community.

There are certain legal issues arising from this order. Firstly, the applicant Umesh Pandey who moved the application in question was not a party to any of the suits related to the Babri Masjid and as such he had no *locus-standi*. Secondly, the Muslims who were parties in the original suits were not allowed to plead. Thirdly, the statements were never recorded in appeals. Finally, the appeal was heard by the District Judge without any records, which were pending before the High Court to decide the 'Receiver' dispute.

It is significant, however, that throughout the years of the Ayodhya dispute, this was the only time the court and the state authorities acted swiftly in such an unprecedented manner. The order was complied with within forty minutes of it being delivered by the authorities. The lock was being broken at 5.19 pm in Ayodhya, seven kilometres away from Faizabad, and the state administration had made all arrangements against any untoward incident. In this hasty process, the Receiver, appointed by the court to look after the disputed property and in whose possession the key of the lock remained, was not informed about the order.<sup>130</sup> Consequently, the lock had to be broken which fulfilled the wish of the *Sangh Parivar*'s 'break the locks' campaign.

This order violated the fundamental religious rights of the Muslim minority community. Mohammad Hashim, a resident of Ayodhya, filed a Writ of Certiorari and Mandamus against the District Court's order which removed the locks.<sup>131</sup> Justice Brijesh Kumar of the

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<sup>129</sup> *Umesh Chandra Pandey v State of UP and Others* (1986) Civil Appeal no 66/1986.

<sup>130</sup> Interview with Z Jilani, Member of All India Muslim Personal Law Board (AIMPLB), Advocate, Lucknow High Court (Lucknow 9 February 2006).

<sup>131</sup> Indian Constitution art 32: when a judgment was made against natural justice, mala fide or perverse, a Writ of Certiorari may be issued. For the same reason, for the infringement of a right in breach of natural justice principle, a Writ of Mandamus may be issued.

High Court issued notice to the opposing party but chose to pass a status quo order<sup>132</sup> thus confirming the rights of the Hindus to continue worshipping the idols and by his order justified the 'error' made by the civil Judge.<sup>133</sup>

Following the opening of the locks, Muslim organisations such as the All India Babri Masjid Action Committee (AIBMAC), Babri Masjid Action Committee (BMAC), and All India Muslim Personal law Board (AIMPLB) intensified their protest to safeguard the Babri Masjid. This in a way worsened the communal situation throughout the country.

The campaign of the *Sangh Parivar* to build a Ram Temple in Ayodhya apparently divided the society along communal lines and thereafter the dispute assumed a national character,<sup>134</sup> in which the role of the media was vital since it gave wide publicity to the dispute.<sup>135</sup> Anticipating the danger ahead, on 10 December 1987, an application was filed at the Lucknow Bench of the Allahabad High Court by the UP State government for the withdrawal of the four title suits for hearing by the High Court to expedite its disposal and also for deferring the hearing of the two Writ Petitions Nos. 746 and 3106 of 1986 filed against the unlocking order. A Division Bench of the High Court allowed the transfer of all the four pending suits from the District Court to the branch of Allahabad High Court at Lucknow for speedy trial.<sup>136</sup> In addition, the state requested the court to pass an order that both parties should maintain the status quo in the disputed property which the court duly complied with.

Thereafter, the *Sangh Parivar* held a nationwide blessing service for the bricks to be used for the construction of the new Ram temple (*Shila Puja*), which were brought in procession to Ayodhya, which resulted in communal violence in many parts of the country.<sup>137</sup> When the suits were pending before the High Court Bench, the *Sangh Parivar* declared 9 November 1989 as *Shilanyas* (laying the foundation ceremony) day. The *Sangh Parivar* chose plot no. 586 for the *Shilanyas*, which was contested by the Muslims as

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<sup>132</sup> In his order, Justice Brijesh Kumar mentioned 'until further order, the nature of the property in question as existing today shall not be changed' in Writ Petition no 746 of 1986.

<sup>133</sup> Allahabad High Court's order dated on 3 February 1986 on WP no 746 of 1986.

<sup>134</sup> DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 191.

<sup>135</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 303-4.

<sup>136</sup> Order dated on 10 July 1989 in Suit no 2 of 1950.

<sup>137</sup> A Nandy and others, *Creating a Nationality: The Ramjanmabhumi Movement and Fear of the Self* (OUP, Oxford 1995) 108.

within the disputed area.<sup>138</sup> Despite the prohibitory court order, the *Sangh Parivar* went ahead with its plan of *Shilanyas* in the disputed plot.<sup>139</sup>

In the subsequent elections, BJP formed the government in UP in 1991 and pledged to build the Ram temple in Ayodhya. This made it easier for the *Sangh Parivar* to change an almost non-existent 'local' issue into one of 'national pride'<sup>140</sup> and importance.

The BJP Government from the beginning of its rule acted in a partisan manner which showed it would fulfil its electoral promise to construct a magnificent Ram temple in Ayodhya.<sup>141</sup> On 7 October 1991, the UP State government through a notification<sup>142</sup> acquired 2.77 acres<sup>143</sup> of disputed land. The main argument of the government was that it acquired this land for the public purpose of developing tourism and providing amenities to pilgrims at Ayodhya. Immediately, in a writ petition,<sup>144</sup> Mohammad Hashim contested the validity of the said acquisition in the High Court Bench, Lucknow, and requested the court to stay the acquisition. More writ petitions were filed both in the High Court and the Supreme Court.<sup>145</sup> The challenges were mainly based on two grounds. Firstly, that the notified land was Waqf property and that such property could not be acquired under the Land Acquisition Act. And secondly, the exercise of power by the state government was

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<sup>138</sup> The Government of UP made a Civil Miscellaneous Application no 48 of 1989 to the Allahabad High Court, for clarification under Section 151 CPC. In the application, the Court was requested to declare that the words 'property in question' mentioned in the interim order dated 14 August 1989 refer to the property including plot no 586 as one of the plots in dispute in the suit. In its order, the Court stated emphatically that 'We clarify that the order dated 14 August 1989, was in respect of the entire property mentioned in the suit, including plot no 586'.

<sup>139</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 29; Sudesh Vaid, *Cry the Beloved Country* (People's Union for democratic Rights, New Delhi 1992) 10.

<sup>140</sup> The resolution adopted by the National Executive of the BJP at its emergent meeting, quoted in *Indian Express* (Bombay, India 18 October 1990).

<sup>141</sup> The day after his swearing in ceremony, 25 June 1991, the Chief Minister Kalyan Singh led his cabinet in a caravan to Ayodhya for a darshan and declared that Ram temple will be constructed at this disputed site. See MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 23.

<sup>142</sup> Vide Notification No 3814/XLI-33-86.

<sup>143</sup> Under Sub-section (1) of Section 4 of the Land Acquisition Act, 1894 (Act No 1 of 1894).

<sup>144</sup> Writ Petition no 3540 (M/B) of 1991 (Civil Miscellaneous Application no 22799 (W) of 1991 and Civil Miscellaneous Application no 22810 (W) 1991.

<sup>145</sup> *Panch Ramanandi Nirmohi Akhara, Ayodhya and Others* WP no 3541 (MB), *Jamiatul Ulmai Hind* WP no 4201 (MB) were filed in the Allahabad High Court and three Writ petitions were filed in Supreme Court of India, *Naveed Yar Khan* no 4000/91, *Mohammad Aslam* WP (C) no 977 and 972 of 1991.



colourable<sup>146</sup> in as much as the real purpose of acquisition was to destroy the mosque and to transfer the land to some Hindu organization to construct a temple thereon.

The High Court Bench in an interim order declared that the State may take possession of the notified land, but no permanent structure shall be put up although a structure of temporary nature could be erected. In addition, the possession shall be subject to further order of the Court and the acquired land shall not be transferred to any party. However, through a Deed of Lease on 20 March 1992 between the State government and the *Shri Ramjanmabhumi* Trust, the land was transferred to the said trust against the order of the High Court.

In defiance of the court order, the *kar sevaks* started building a platform on the acquired land, after demolishing existing buildings and temples which clearly violated the status quo order. This was challenged by the Muslims before the court and on 15 July 1992, the Lucknow Bench passed an order stopping any construction activity on the disputed site. On 16 July 1992, the Chief Secretary directed the DM and SSP to ensure compliance with the High Court orders. However, the VHP leaders and priests declared that they would not allow anyone seeking to implement the court orders to enter the area. This proved that the will and capacity of the State Government to enforce the orders of the highest court of the land were put to test and were found to be totally lacking.<sup>147</sup>

Due to the increasing communal tension, on 10 September 1991, the *Lok Sabha*<sup>148</sup> passed the Places of Worship (Special Provisions) Bill<sup>149</sup> which prohibited conversion of any place of worship, and made their request to maintain the religious character of any place of

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<sup>146</sup> Justice Krishna Iyer defines colourable legislation as: In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. *RS Joshi and others v Ajit Mills Ltd and another; RS Joshi and others v Idar Taluka Sahakari and others* (Civil Appeals no 533, 1004, 1410 and 1671-1685 of 1975) AIR 1977 SC 2279.

<sup>147</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 62.

<sup>148</sup> *Lok Sabha* is the lower house of the Parliament like the House of Commons in Britain.

<sup>149</sup> Places of Worship (Special Provisions) Act (Act No 42 of 1991).

worship as it existed on the 15 August, 1947, the day India became an independent state. However, the Babri Mosque was excluded from its purview.<sup>150</sup>

On 31 October 1992, the *Daram Sansad*, a religious Parliament of Hindu priests, announced the resumption of *kar seva* from 6 December 1992.<sup>151</sup> The Prime Minister tried to counter the increasing communal tension by making an appeal to the Supreme Court to intervene.<sup>152</sup> Subsequently, on 27 November, through an affidavit, the UP State Government assured the Court, that they would protect the mosque. The High Court appointed Tej Shankar, a District Judge, as an observer who would report periodically.<sup>153</sup> Despite objections by opposing counsel, the Supreme Court in its order of 28 November 1992 permitted *Kar Seva* as 'a symbolic occasion' and disallowed any construction work on the acquired 2.77 acres of land.

On 30 November 1992, the Supreme Court asked the UP State Government to improve the inadequate security arrangements. However, despite all the assurances from the state government, the Babri Mosque was demolished by the *Sangh Parivar* on 6 December 1992 as is discussed in the overview.

### 3.3.4. Litigation and State action, 1992-

After the demolition, in reply to the six writ petitions<sup>154</sup> filed against the acquisition of the land by the UP Government, the first judicial verdict came on 11 December 1992 in the form of striking down the Acquisition of the Land Act 1991. This Act was challenged on

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<sup>150</sup> Ibid s 5 : 'Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janmabhumi-Babri Masjid situated in Ayodhya, UP to any suit, appeal or other proceeding to the said place or place of worship'.

<sup>151</sup> 'Nothing Can Stop Kar Seva' *The Hindu* (New Delhi 1 November 1992).

<sup>152</sup> 'Ayodhya: PM Favours Court Arbitration' *The Hindu* (New Delhi 15 November 1992).

<sup>153</sup> 'Observer for Ayodhya' *The Hindu* (New Delhi 30 November 1992).

<sup>154</sup> (1) *Mohammad Hashim v State of UP and others* Writ Petition no 3540 (MB) of 1991

(2) *Panch Ramanandi Nirmohi Akhara v State of UP and others* Writ Petition no 3541 (MB) of 1991

(3) *Mohammad Aslam @ Bhure v Union of India and others* Writ Petition no 4183 (MB) of 1991

(4) *Mohammad Aslam @ Bhure v Union of India and others* Writ Petition no 4184 of 1991

(5) *Naveed Yar Khan v State of UP and others* Writ Petition no 4185 (MB) of 1991 and

(6) *Jamaat-e-Islami Hind v State of UP and others* Writ Petition no 4201 (MB) of 1991. These six Writs together are known as, 'Acquisition of the Land Case'.

the following broad grounds – (1) Malafide, (2) Violation of Articles 25, 26, 15 and 14 of the Constitution, and (3) Non-application of mind by the state to the material facts in respect of public purpose.<sup>155</sup> Considering the importance of the judgement which explained the varying stances of the state government, it merits the following detailed examination.

In its order, the Court observed that the petitioners were justified in alleging that the acquired land covered a substantial part of the property under litigation. Following acquisition of the land, the state government gave advantage to one party in litigation over the other and gave favourable treatment to one religious group of its choice over the other. The first action violated Article 14 of the Constitution being discriminatory as well as arbitrary, and the second violated Article 15(1) which mandates that ‘the state shall not discriminate against any citizens on grounds only of religion’. In a private dispute, the state is required to observe neutrality; the impugned action lacked the neutrality hence the acquisition was constitutionally invalid.<sup>156</sup>

On the mala-fide intention of the state, Justice Mathur held that the *Ramjanmabhumi Nyas* Trust deed was executed on 18 December 1985. The deed says that the first objective of the trust is to reconstruct the temple of Sri Ramjanmabhumi and the beautification of the spot all around. The rest of the objectives are connected with the reconstruction of the temple and re-installation of deities. From the deed, it became very clear that the granting of the acquired land<sup>157</sup> to the said trust was not for a public purpose, but rather it favoured one side over the other in the litigation.

Regarding the allegation of colourable exercise of power, Justice Mathur remarked that the land had been handed over to a trust whose aims and objectives are religious and whose trust board is dominated by members of the VHP. This confirmed the fear of the minority

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<sup>155</sup> The petitioners challenged the dispensing with the enquiry under Section 5-A (hearing of objections in land disputes) of the Land Acquisition Act 1894 (Act No 1 of 1894). AG Noorani (ed), *The Babri Masjid Question 1528-2003: ‘A matter of National Honour’* (Tulika Books, New Delhi 2003) Vol II, 75.

<sup>156</sup> Judgement dated on 11 December 1992 in ‘Acquisition of the Land Case’.

<sup>157</sup> The background of 1991 acquisition needs mentioning here. Some 55.674 acres of land, well beyond the Babri Mosque, were acquired on 20 and 23 January 1989 and on 27 September 1989, for laying out a Ram Katha Park by the previous government. This land coupled with the land acquired by the BJP Government on 7 October 1991 was given to the *Shri Ramjanmabhumi* Trust. AG Noorani (ed), *The Babri Masjid Question 1528-2003: ‘A matter of National Honour’* (Tulika Books, New Delhi 2003) Vol I, 359.

community that the state had acquired the land with the colourable exercise of power.<sup>158</sup> The notification and subsequent handing over of the land to *Ramjanmabhumi Nyas* was a colourable exercise of power, since it was a disguised attempt to support the demolition of the Babri Masjid with the intent of building the Ram temple.

Though the arguments were concluded on 4 November 1992, the judgement was only delivered on 11 December 1992, which was after the demolition of the Babri Masjid. The BJP alleged that if the judgement had been delivered before the demolition, the structure might have been saved.<sup>159</sup> To this allegation of delay, the judges replied that 'the present writ petitions have nothing to do with the roofed structure which has been demolished'.<sup>160</sup> Different stands of state governments of UP from 1950 until 1991 was explained in a separate opinion by Justice S.H.A. Raza.<sup>161</sup> This judgement shows the inequitable acquisition of the land by the state government.

After the demolition, a Writ Petition was filed before the High Court by a less known forum called the World Hindu Lawyers Association praying for the *darshan* of the deity in the makeshift Hindu temple.<sup>162</sup> They requested the court to allow them to exercise their constitutional right to worship<sup>163</sup> and to remove the hurdles for *darshan* and worship. In their judgment, Justices H.N. Tilhari and A.N. Gupta ordered the relaxation of the orders

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<sup>158</sup> In *Federation of Hotel and Restaurant v Union of India* (AIR 1990 SC 1637), the Supreme Court held that 'in a federal constitution, transgression of its limits of power by a legislature may be (i) open, direct and overt, or (ii) disguised, indirect and covert'. The latter is an example of 'colourable legislation'.

<sup>159</sup> Bharatiya Janata party, 'Chapter IX in BJP's White Paper on Ayodhya and the Ram Temple Movement' <<http://www.hvk.org/specialrepo/bjpwp/index.html>> accessed on 10 February 2006.

<sup>160</sup> AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (Tulika Books, New Delhi 2003) Vol II, 81.

<sup>161</sup> Justice Raza observed that 'it is necessary to point out the vacillating, wavering and ever-changing stand of the State Government. From the order sheets of the suit filed from 16 January 1950 to 25 November 1961 the District Government counsel has put in his appearance. On 23 May 1962 an application was moved by District Government Officer (Civil) in Regular Suit No 12/61 filed by Sunni Board of Waqfs stating that the government was not interested in the property in suit and as such it did not propose to contest the suit. ... This application was allowed and an order proceeding ex parte against the State and its officers was passed. However, suddenly after 1 June 1991 the stand of the State Government underwent a complete change. The Government identified itself with one community against another. ... The events that led to demolition of the shrine and the inaction of the State Government proved beyond any shadow of doubt, that the State Government was an accomplice of that shameful and dastardly act, which has desecrated the democratic and secular character of Indian Constitution'. AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (Tulika Books, New Delhi 2003) Vol II, 81-85.

<sup>162</sup> See n 69, below.

<sup>163</sup> Indian Constitution art 25.

which were imposed under Section 144 CrPC<sup>164</sup> after the demolition. The judges also directed through the issuance of a Writ of Mandamus that the state officials allow the petitioners, the Hindus and devotees of Ram to have *darshan* in the makeshift temple at Ayodhya.<sup>165</sup> The judges made their decision in part because an illustrated copy of the Constitution signed by members of India's Constituent Assembly in 1949 contained a picture of the Hindu God Ram.<sup>166</sup> The judges found that Ram was therefore 'a constitutional entity' and a 'figure constitutionally accepted as the Lord by the builders of this nation and its culture'.<sup>167</sup> The High Court's *darshan* order was challenged in the Supreme Court which refused to pass any order on the pleas of Muslim organizations to stay the High Court order and directed maintenance of the status quo.<sup>168</sup>

The union government, after the demolition, through the *Acquisition of Certain Areas at Ayodhya Act*<sup>169</sup> acquired 67.03 acres of land in and around the Babri Masjid complex. This led to the filing of a Writ Petition in the Supreme Court by Ismail Faruqui against the union government.<sup>170</sup> The union government also approached the Supreme Court through the Special Reference No.1 of the President of India<sup>171</sup> under Article 143(1)<sup>172</sup> of the Constitution, which was also challenged in the same petition by Ismail Faruqui.

<sup>164</sup> CrPC (n 103) s 144 grants power to a Magistrate to issue order in urgent cases of nuisance or apprehended danger to life, health or safety, or a disturbance of the public tranquillity, a riot, or an affray.

<sup>165</sup> Judgement delivered on 1 January 1993 by Justice HN Tilhari and AN Gupta in *Vishwa Hindu Parishad v Union of India* case cited in AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A matter of National Honour'* (Tulika Books, New Delhi 2003) Vol II, 247-48.

<sup>166</sup> H McDonald, 'India: Backlash in Bombay' (January 1993) 21 Far Eastern Economic Review 16, 18.

<sup>167</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 173.

<sup>168</sup> S Ahmad, 'Judicial Complicity with Communal Violence in India' (1996) 17 Nw J Int'l L & Bus 320, 334.

<sup>169</sup> Act No 33 of 1993.

<sup>170</sup> *Ismail Faruqui v Union of India* AIR 1995 SC 605.

<sup>171</sup> On 7 January 1993, the President of India requested the Supreme Court to answer the Special Reference under Article 143 (1) of the Constitution of India. It reads thus: 'Whereas a dispute has arisen whether a Hindu temple or any Hindu religious structure existed prior to the construction of the structure (including the premises of the inner and outer courtyards of such structure, commonly known as the *Ramjanmabhumi-Babri Masjid*), in the area in which the structure stood in Village *Kot Ramchandra* in Ayodhya, in *Pargana Haveli Avadh*, in *Tahsil Faizabad Sadar*, in the District of Faizabad of the State of Uttar Pradesh; Now, therefore, in exercise of powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Shankar Dayal Sharma, President of India, hereby refer the following question to the Supreme Court of India for consideration and opinion thereon, namely: Whether a Hindu Temple or any Hindu religious structure existed prior to the constitution of the *Ramjanmabhumi-Babri Masjid* (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?'. AG Noorani (ed), *The Babri Masjid Question 1528-2003: 'A Matter of National Honour'* (Tulika Books, New Delhi 2003) Vol II, 253-54.

<sup>172</sup> Indian Constitution art 143: Power of President to consult Supreme Court (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he refers the

In the Ismail Faruqui case, Justice Verma stated that there can be no doubt that the Special Reference made under Article 143(1) of the Constitution cannot be construed as an effective alternate dispute-resolution mechanism to permit substitution of the pending suits and legal proceedings. Accordingly sub-section (3) of Section 4 of the Acquisition of Certain Lands in the Ayodhya Act, 1993<sup>173</sup> was declared unconstitutional.<sup>174</sup> The Court also held that ‘the best solution in the circumstances, on revival of the suits, is therefore to maintain status quo as on 7 January 1993 when the law came into force’. Regarding the President’s Reference, the Court held that:

The Special Reference No.1 of 1993 made by the President under Article 143(1) of the Constitution of India is superfluous and unnecessary and does not require to be answered. For this reason, we very respectfully decline to answer it and return the same.<sup>175</sup>

In pursuance of the Supreme Court judgment on 24 October 1994, proceedings in the High Court were re-started in January 1996. Subsequently oral evidence in the suits<sup>176</sup> was completed on 30 November 2004. From 01 December 2004, the evidence of the defendants was started and is still in progress.

The BJP union government made efforts to hand over the 67.703 of the ‘undisputed land’ to a trust which was controlled by the VHP to construct a Ram Temple in Ayodhya in 2002.<sup>177</sup> To clear the legal hurdles the union government approached the Supreme Court with its plea for lifting the restriction on the 67 acres of land in Ayodhya which it claimed as undisputed territory. The Supreme Court, by its order<sup>178</sup> on 31 March 2003, clearly rejected the union government’s application to lift the ban, earlier imposed by the court, stating that no religious activity of any kind would be permitted either on the 2.77 acres of ‘disputed land’ or the 67 acres of ‘undisputed land’. The court further prohibited the union

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question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

<sup>173</sup> *Indira Nehru Gandhi v Raj Narain and another* AIR 1975 SC 1590.

<sup>174</sup> The imperative portion of judgement is related to Sub-section (3) of Section 4 which provides for abatement of all pending suits and legal proceedings in respect of the right, title and interest relating to any property which has vested in the Union Government under Section 3.

<sup>175</sup> Judgement on 24 October 1994 in *Ismail Faruqui v Union of India and Others* AIR 1995 SC 605.

<sup>176</sup> Other Original Suits (OOS) no 4 of 1989; OOS no 5 of 1989; OOS no 1 of 1989; OOS no 3 of 1989 – arranged according to the oral evidence of the plaintiffs.

<sup>177</sup> ‘SC Rejects Centre’s Plea to Lift the Ban on Religious Activities’ *The Hindu* (New Delhi 1 April 2003).

<sup>178</sup> *Mohammad Aslam Bhure v Union of India and Others* Writ Petition (Civil) no 160 of 2002.

government from handing over the acquired land to anyone till the final disposal of the suits in the High Court.

To sum up, the ‘Status Quo’ order upheld by the courts from 1950 to this day is a clear violation of the equality principle granted in the Constitution giving preference for one community over the other. It can also be observed at this point that the rise of BJP as a ruling party has further pushed the Ayodhya dispute to the centre stage in Indian politics.

### **3.4. Role of the Indian state organs**

This section examines the failure of various state organs that allowed the Babri Masjid dispute to persist for more than half a century, culminating in its demolition. The threat posed by this failure on secularism,<sup>179</sup> the federal system<sup>180</sup> and minority rights are reviewed below.

#### **3.4.1. Local dispute assuming national character**

For thirty five years (1950-1985), the Ayodhya dispute remained a local dispute between a few members of two religious communities. It may be ascertained that the judiciary and the executive had enough time to settle the dispute amicably if they had acted judiciously. However, the failure to apply the provisions of law for a speedy remedy allowed it to become a national dispute resulting in nationwide riots and killings. An examination of the events occurring during this period seeks to establish the fact that the courts and the executive discriminated against the Muslim minority community.

When the idols were placed inside the mosque, those who were involved in the illegal act<sup>181</sup> violated the provisions of the Indian Penal Code (IPC)<sup>182</sup> sections 295-298 which defined the offences relating to religion. Under section 295 of IPC<sup>183</sup>, anyone involved in destroying, damaging and defiling a sacred site should be punished. The word defile means

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<sup>179</sup> The Preamble of the Indian Constitution declares India as a Secular and Democratic Republic.

<sup>180</sup> Articles 245-63 of the Indian Constitution delineate the relations between the Union and the States.

<sup>181</sup> From the First Information Report by Constable Mata Prasad, dated 23 December 1949.

<sup>182</sup> Indian Penal Code (Act No 45/1860) (IPC)

<sup>183</sup> IPC (n 181) s 295: ‘whoever destroys, damages, or defiles any place of worship, with the intention of insulting the religion shall be punished’.

those acts that would make an object of worship unclean as a material object, and also extends to acts done in relation to the object of worship.<sup>184</sup>

According to Section 297 'whoever with the intention of wounding the feeling of any person, or of insulting the religion of any person, commits any trespass in any place of worship ... shall be punished'. The few members of the Hindu communal organization, by taking the idols inside the mosque to worship, committed trespass under this section. After installing the idols, the perpetrators began singing hymns and raising slogans claiming that 'idols of Ram appeared miraculously'. Those actions violated Section 298, which described that whoever with the deliberate intention of wounding the religious feelings of any person utters any word or makes any sound in the hearing of the person ... places, shall be punished.

Apart from those religious offences, placing the idols caused great animosity among the two communities and threatened public tranquillity in transgression of section 505 of IPC.<sup>185</sup> The First Information Report of the police clearly named three people and fifty unknown people in connection with the desecration of the mosque. There was no evidence to prove that any of those persons were punished or the state authorities took any concrete efforts to remove the idols from the mosque immediately. When the above mentioned provisions are applied to the Ayodhya dispute, the failure of the state executive authorities becomes apparent.

The dispute arose through the installation of the Hindu deities inside the mosque, and the state authorities immediately took possession of the mosque. In this dispute, the law provided a clear and speedy remedy for its restoration to the original owners, the Muslims. Section 145 of the CrPC 1973 offered a solution for the restoration of property to the dispossessed by a Magistrate's order, leaving it to the aggressor to file a civil suit on title.<sup>186</sup> In the Ayodhya dispute, however, this provision was used against the Muslims to install a Receiver. The Receiver was asked to design a 'scheme of management' which

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<sup>184</sup> *Kuttichami Moothan v Rama Pattar* (1918) 41 Madras 980.

<sup>185</sup> IPC (n 181) s 505: 'anyone intent to cause or which is likely to cause fear or alarm to the public shall be punished'.

<sup>186</sup> CrPC (n 103) s 145 (6): If the Magistrate decides that one of the parties was or should under the second proviso to sub-section (4) be treated as being in such possession of the said subject he shall issue an order declaring such party to be entitled to possession thereof until evicted there from in due course of law..., may restore to possession the party forcibly and wrongfully dispossessed.



included the worship to the deities, and the scheme was subsequently endorsed by the District Magistrate.<sup>187</sup>

When the Chief Secretary of UP Government, Bhagawan Sahay, wrote to the Faizabad District Magistrate (DM), K.K. Nayar, to remove the idols and restore the property to its owners, the DM admitted that 'the installation of the idol in the mosque has certainly been an illegal act'.<sup>188</sup> Knowing that it was an illegal act, the DM allowed the attachment of the mosque and permitted the Hindu priests to conduct worship inside the mosque. Consequently, the order of the DM was a clear violation of the secular principle enshrined in the constitution, which violated the Muslims' right to worship.<sup>189</sup> By treating one community unequally before the law,<sup>190</sup> it showed discrimination by allowing the Hindu priests to worship inside the mosque.<sup>191</sup> From this moment onwards, through the order of the state executive authorities, the Muslims were prevented from worshipping in the mosque.

The complicity of the state government is proved from its varying stances in the court in the Ayodhya Dispute.<sup>192</sup> Gould highlighted this fact in his book *Grass Roots of Politics in India* when he observed that 'Pandit Pant'<sup>193</sup> had played politics with the issue in 1948 when he visited Faizabad in search of conservative Hindu support for the candidate whom congress had put up against Narendra Deva, a socialist candidate'.<sup>194</sup> The state government

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<sup>187</sup> AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, 222.

<sup>188</sup> Letter from Deputy Commissioner, Faizabad, to Chief Secretary, Government of UP dated 27 December 1949. MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 34-7.

<sup>189</sup> Indian Constitution art 25: Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

<sup>190</sup> Indian Constitution art 14: The State shall not deny to any person equality before the law or the equal protection of the law within the territory of India.

<sup>191</sup> Indian Constitution art 15(1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>192</sup> On behalf of the State of UP and its officers, written statements were filed in some of the main suits. Objections were filed against the application for grant of injunction. The order of injunction was modified on 19 January 1950 at the behest of the District Administration that the idols kept in the *Janmabhumi* would not be removed, which order was upheld by the High Court. All of a sudden, it distanced itself from the suits. However, the Receiver appointed by the State Government was still in charge of the mosque.

<sup>193</sup> Pandit Pant was then Chief Minister of Northern Province which later known as the State of UP.

<sup>194</sup> GA Gould, *Grass Roots Politics in India: A Century of Political Evolution in Faizabad District* (IBH Publishing Co, Oxford 1994) 181-86.

failed to settle the dispute at its earliest opportunity but rather it adopted a negligent attitude in an effort to stay in power.<sup>195</sup>

The first suit was filed in the civil court at Faizabad in 1950. The judiciary, instead of correcting the legal errors committed by the District Magistrate, compounded the errors by granting an *ex parte* interim injunction requested by the plaintiffs, an organisation consisting of Hindu priests. This interim injunction permanently barred Muslims from the Babri Masjid while allowing the Hindu priests to conduct worship of the idols kept inside the mosque.

This stay order was made permanent by the civil judge, Faizabad, in 1951. In this case, the arguments on merits were heard by the court on 17 February 1951, and the judgement confirming the interim injunction was passed on 3 March 1951. After hearing the arguments and in the intervening period of judgement, the judge allowed a few 'affidavits' from the defendants. This is a clear violation of the principle of natural justice. This judgement permanently stayed the rights of the minority community to worship in the Babri Masjid. Another judge ordered the locks to be opened for the Hindus to use the mosque as a temple in 1986. This point was clearly highlighted by Ahuja when he stated, 'the present turmoil stems from two court decisions, one of 1951 and the second of 1986'.<sup>196</sup>

The appeal went to the High Court on 3 March 1951,<sup>197</sup> which had a duty to correct the unfair judgements of the lower courts and safeguard the rights of the minorities guaranteed by the Constitution.<sup>198</sup> The High Court was entrusted with enough power to rectify the failures arising from the lower courts.<sup>199</sup> This interference is limited to want of jurisdiction, errors of law, perverse findings, and gross violation of natural justice.<sup>200</sup> It was necessary that the High Court exercise its power under article 227 if it was shown that grave injustice had been done to a party and the case was a fit case as observed by the Supreme Court in

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<sup>195</sup> *Mohammad Hashim v State of UP and Others* Writ Petition no 3540 (MB) of 1991.

<sup>196</sup> GM Ahuja, *BJP and the Politics: Policies and Programmes of the Bharathiya Janata Party* (Ram Co, New Delhi 1994) 320.

<sup>197</sup> Suit no 2 of 1950.

<sup>198</sup> BR Agarwala, *Our Judiciary* (National Book Trust, New Delhi 1993) 83. Under section 397 (1) the High Court has the power of revision over all executive and Judicial Magistrates decisions. Any order made by an Executive Magistrate is subject to the revisional jurisdiction of the High Court.

<sup>199</sup> Indian Constitution art 227(1): Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

<sup>200</sup> PM Bakshi, *The Constitution of India* (Universal Law Publishing Co, Delhi 2002) 195.

the Mathai case.<sup>201</sup> By allowing the idols to remain inside the mosque, the High Court approved the forceful appropriation of the mosque by the members of Hindu communal groups and the state executive authorities.

Since the dispute was left to simmer for thirty five years, the VHP gave an ultimatum to the government that the locks of the mosque must be opened before 8 March 1986. So far the dispute remained as a mosque versus temple and remained religious issue which could not generate a movement. When VHP entered the scene, it became a Rama versus Babar issue and took a nationalistic overtone.<sup>202</sup> A major turning point in the Ayodhya dispute arose from the Faizabad civil judge's order 'to open the locks' of the Babri Masjid in 1986. The judge in his order stated that 'for the last 35 or 36 years, no member of the other community has offered any *namaz* prayers. They were not allowed to enter the site'.<sup>203</sup> What the judge failed to mention was that the other community, the Muslims, were denied its right to worship due to the court order in 1951.<sup>204</sup> The order further stated that 'since 1951 no riot or no law and order problem has arisen at this place'. If that was the case, the District Magistrate should have withdrawn the attachment order and restored the property to the Muslims once he was satisfied that there was no longer a public order problem.<sup>205</sup>

Another crucial point is that the civil judge made his order while the original title suits in the dispute were pending before the High Court. This ostensible injudicious action by the judge strongly suggested that political influence was used in making this judgement.<sup>206</sup> It may not be an exaggeration to state that this order, in essence, communalised the situation more than any other dispute in independent India. The protest by the Muslim community against the opening up of the locks took the issue further than the limits of UP.

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<sup>201</sup> *Ouseph Mathai v M Abdul Khadir* AIR 2002 SC 110.

<sup>202</sup> Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hinduism and Muslims in India* (Yale University Press, New Haven 2002) 81.

<sup>203</sup> *Umesh Pandey v State of UP and Others* in Civil Appeal no 661/1986.

<sup>204</sup> *Ismail Faruqui and Others v Union of India and Others* AIR 1995 SC 605. The justices Barucha and Ahmadi observed that: No account is taken of the fact that there is a dispute in respect of the site on which puja is to be performed; that as stated in the white paper of government of India, until the night of 22<sup>nd</sup>/23<sup>rd</sup> December 1949, when the idols were placed in the disputed structure, it was being used as a mosque and that the Muslim community has a claim to offer *namaz* thereon.

<sup>205</sup> CrPC (n 103) s 146(1).

<sup>206</sup> M Godbole, *Unfinished Innings: Recollections and Reflections of a Civil Servant* (Orient Longman, New Delhi 1996) 334-35.

### 3.4.2. Judicial failure to provide speedy resolution

As the litigation section indicated, in pre-independent India, the Ayodhya dispute did not become a major issue since the suits were disposed of as soon as possible. In post-independent India the courts enjoyed constitutional status and the independence of the judiciary was ensured through various provisions in the Constitution which provided for an effective and speedy remedy for all citizens. According to the Constitution, judicial decisions should be based on the democratic and secular principles inherent in the Constitution.<sup>207</sup> However, this was found lacking in the Ayodhya dispute.

The state government, after thirty-six years of delay, approached the High Court to withdraw all the four title suits from the district court for a quick disposal.<sup>208</sup> Though the application was filed on 10 November 1987, the hearing of the withdrawal application did not take place until 23 February 1989. This demonstrated the negligent attitude of the courts in such a sensitive issue as the Ayodhya dispute.

In 1989 VHP organised the manufacture of so-called *Ramshilas* (bricks anointed with the holy water in the name of Lord Ram) all over India, in the USA, the UK and Canada which were to be taken to Ayodhya for the ritual of *Shilanyas*. The union government tacitly supported the *Ramshila* programmes by allowing the foundation stones for the proposed Ram temple to be laid adjacent to the Babri Masjid.<sup>209</sup>

The intention of the *Sangh Parivar* to destroy the mosque was revealed by Ashok Singhal<sup>210</sup> when he openly declared that the *sanctum sanctorum* or the *garpha griha* of the proposed temple will remain at the same place where the idol is worshipped at present. In response Muslim organizations started legal proceedings to prevent the *Shilanyas*, and thereby to protect the mosque. The *Shilanyas* campaign led to serious communal conflicts which could have been avoided if the courts had prevented the *Shilanyas* or allowed them

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<sup>207</sup> Human Rights Watch, *Playing the 'Communal Card': Communal Violence and Human Rights* (HRW, New York 1995) 19.

<sup>208</sup> CPC (n 114) s 24(1): On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any state - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same.

<sup>209</sup> PS Ghosh, *BJP and the Evolution of Hindu Nationalism: From Periphery to Centre* (Manohar, New Delhi 1999) 93.

<sup>210</sup> Asokh Singhal is the International President of the VHP.

to conduct the ceremony in some other suitable place. V.R. Krishna Iyer, a former Supreme Court Justice, commented on the judicial failure as it 'will be described as the villain of the piece. It lacked the guts to face the issue'.<sup>211</sup>

The *Shilanyas* should have been prevented, because the freedom of religion enshrined in Article 25 of the Constitution is not a guarantee in respect of one religion but it covers all religions alike.<sup>212</sup> The right to worship as guaranteed in the Constitution does not extend to the right of worship at any and every place, for the simple reason that a hindrance to worship at a particular place, per se, might infringe the religious freedom guaranteed under Articles 25 and 26. Therefore, while praying or worshipping is a religious practice, holding them at every location would not be an essential and integral part of such religious practice protected under Article 25.<sup>213</sup> This fundamental freedom must yield to the maintenance of public order, morality and health of the people.<sup>214</sup> The *Shilanyas* was an example of an abuse of articles 25 and 26 of the Constitution.

When the UP state government headed by the BJP acquired 2.74 acres of disputed land through a notification, it was challenged by various writ petitions both in the Supreme Court and the High Court as the acquisition infringed the rights of the minority community. The Supreme and the High Courts ordered the state to maintain the status quo. Subsequent to the status quo order, the department of tourism demolished several old structures in the vicinity, including temples. This action was challenged by Rizvi<sup>215</sup> in a contempt petition in the Supreme Court. There was no final order until the mosque was demolished on 6 December 1992.

The above discussion requires analysis of the problem of delay<sup>216</sup> in the Indian courts. This may enable an argument over whether the delay was inevitable or it was used tactically to postpone the dispute.

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<sup>211</sup> *The Times of India* (New Delhi 11 November 1989).

<sup>212</sup> *Reverend Stanislaus v State of MP* AIR 1977 SC 908.

<sup>213</sup> *Ismail Faruqi v Union of India* AIR 1995 SC 605.

<sup>214</sup> *Ratilal v State of Bombay* AIR 1954 SC 388.

<sup>215</sup> *Acchan Rizvi V State of Uttar Pradesh and Others* Contempt petition no 102 of 1992.

<sup>216</sup> 'Delay resulted in demolition' claimed BJP. 'The Role of Law and the Judiciary in the Ayodhya Case' <<http://www.hvk.org/specialrepo/bjpwp/ch9.html>> accessed on 3 March 2006.

Delay is defined as the ‘pathology of the Indian legal system.’<sup>217</sup> There are several factors involved in causing delay in the civil courts. Chodosh highlighted some of the procedural causes of delay.<sup>218</sup> The functional and systematic characteristics of the contemporary Indian judicial system can be traced back to the adversarial British model of civil justice process which consists generally of several stages. The adversarial model appears poorly designed to meet the needs of a rural population with widespread poverty, illiteracy and unfamiliarity with formal legal procedure since most of it is conducted in the English language.<sup>219</sup> The very nature of adversarial proceeding is such that the parties are at liberty to exploit the technicalities of the procedure for covering up the substantive weakness of their case<sup>220</sup> and this was used as a cover in the Ayodhya dispute.

‘The real contest is in the court of first appeal ... based on the assumption that the lower courts are incompatible to do anything more than prepare a record of evidence’ observed Gledhill in *Some Aspects of Indian Law Today*.<sup>221</sup> Prolonged cross-examinations, not so well-qualified stenographers, and lengthy arguments in the appeal and execution of the judgment are some of the reasons for the delay. Indian legal experts have calculated estimates of average delays in the civil process of ten to fifteen years.<sup>222</sup> From the

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<sup>217</sup> O Mendelsohn, ‘The Pathology of the Indian Legal System’, (1981) 15 *Modern Asian Studies* 824.

<sup>218</sup> HE Chodosh and others, ‘Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process’ (1997-1998) 30 *NYU J Int’l L & Pol* 1, 25. Chodosh points out a few reasons for delay which include: free access for civil claimants to the courts with incentives for frivolous, party-controlled litigation processes (including initiation without cause, extension without excuse, motions without merit), discontinuity, repetition and fragmentation of the legal processes without early or accountable judicial intervention such as court administration and case management mechanisms, limited opportunity or incentive for consensual settlements including limited venues for alternative dispute resolution processes such as mediation and systematic causes derived generally from insufficient investments in human and institutional resources to perform allocated procedural functions.

<sup>219</sup> *Ibid* 29.

<sup>220</sup> VS Deshpande, ‘Civil Procedure’ in J Minattur (ed), *The Indian Legal System* (Tripathi NM, Bombay 1978) 201. Some of the critical factors involved in delay are: Objections to pecuniary or territorial jurisdiction; Applications for transfer; Pleas of facts; Framing of issues; Preparation of decrees; Failure to scrutinise plaint and appeal; Revision; Death of defendants or respondents; Filing of suits, and appeals for sole purpose of delay; Multiplicity of appeal, and Stays and temporary injunctions.

<sup>221</sup> A Gledhill, *The Republic of India: The Development of its Laws and Constitution* (Stevens, London 1964) 238-41.

<sup>222</sup> HE Chodosh and others, ‘Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process’ (1997-1998) 30 *NYU J Int’l L & Pol* 1, 29. Chodosh and others indicate the time period between the filing of the complaint and the written statement and the framing of the issues by the court averages six to nine months, the taking of evidence takes an average of five years. In the case of appeals, the current backlog is twelve years for interim orders and longer for final dispositions. This may add up to a time period exceeding twenty years for much litigation.

beginning of Indian independence, the issue of delay was addressed by the Law Commission. If the problem of delay in the lower courts is huge, it is no less acute when one looks at the higher judiciary where cases have been pending for over ten years.<sup>223</sup>

A procedural law is void if it does not provide for speedy trial observed the Supreme Court<sup>224</sup> and as such speedy trial is a fundamental constitutional right though it mainly applies to criminal cases.<sup>225</sup> After thorough research of the Indian legal system, Moog argued that 'a series of structural constraints and an imbalance of power between the judges and attorneys' exist in the lower courts.<sup>226</sup> In addition, the lower courts were influenced by caste, kinship, and friendship ties. Rudolph points out that 'this is significant in a society where corporate identities still play a vital role, loyalty to the group may take precedence over loyalty to the legal system', which often stresses the rights of the individuals.<sup>227</sup>

The Civil Justice Committee in 1925 itself noted that the existence of a mass of arrears tempted many presiding officers to hold back in settling the more heavily contested suits and instead devote their attention to the lighter ones.<sup>228</sup> The absence of any monitoring of the local judicial process fosters a wilful negligence among some judges which resulted in more adjournments and interim injunctions.<sup>229</sup> The litigants are also not blameless for delays since they go to the court for a variety of reasons other than for rapid resolution, providing advocates with a rationale for extending cases.<sup>230</sup>

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<sup>223</sup> M Kachwaha, *The Judiciary in India: Determinants of its Independence and Impartiality* (Leiden, Netherlands 1998) 38.

<sup>224</sup> *Hussainara v Home Secretary, State of Bihar* AIR 1979 SC 1360; PM Bakshi, *The Constitution of India* (Universal Law Publishing Co, Delhi 2002) 55-6.

<sup>225</sup> Under Article 21 of the Indian Constitution, speedy trial is included as a constitutional right. *Common Cause Laws v Union of India* AIR 1996 SC 1619.

<sup>226</sup> R Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control' (1992) 16 Just Sys J 19, 22.

<sup>227</sup> LI Rudolph and SH Rudolph, *The Modernity of Tradition* (University of Chicago, Chicago 1967) 263.

<sup>228</sup> Report of Civil Justice Committee 1925, 21-2 cited in R Moog, 'Delays in the Indian Courts: Why the Judges Don't Take Control' (1992) 16 Just Sys J 19, 24.

<sup>229</sup> J Paul, 'Authority and Professional Control of the Subordinate Legal Profession in the Madras Presidency during the Late Nineteenth Century' in Y Malik and DK Vajpeyi (eds), *Boeings and Bullock Carts: Studies in Change and Continuity in Indian Civilization* (Chanakya, Delhi 1990) 217.

<sup>230</sup> Order XVII Rule 1 of CPC (n 114) states that court may grant time and adjourn hearing (1) The court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing: provided that no such adjournment shall be granted more than three times to a party during hearing of the suit.

Though the higher courts suffer from the same problems, the focus here is mainly on the lower courts because it is they who dispense justice at a local level. Regarding the importance of the lower courts, the former justice of the Supreme Court Bhagwati observed:

We do not seem to realize that it is subordinate courts which form the basis of the pyramid of justice and unless the base is strengthened, the pyramid is bound to crumble. It is often forgotten that the contact of the common man with the justice system occurs only at the level of the subordinate courts. It is imperative to strengthen the subordinate judiciary to inspire confidence in him.<sup>231</sup>

Various Law Commission reports and experts have stated the need for judicial reform to rescue the judicial system from the clutches of delay and arrears.<sup>232</sup> Justice V.D. Tulzapurkar of the Supreme Court once commented,

If an independent judiciary is regarded as the heart of a republic, then the Indian republic is at present suffering from serious heart ailment. As an ailing heart cannot ensure vigorous blood supply for the sound health of its people, the judiciary is not able to provide speedy remedy to the people.<sup>233</sup>

It can now be established how delay was used to deny the rights of a minority community. Although delay has been an ever present factor in the Indian legal system, it does not usually exceed ten to fifteen years. However, in the Ayodhya dispute the delay was extended to forty-two years (1950-1992) without even a preliminary trial. This suggests that delay became a tool to deny justice to the Muslim community, a direct infringement on fundamental human rights.

Given the pre-existing tension between the Hindu and Muslim communities, the judiciary, in such an emotional issue as the Ayodhya dispute, should have foreseen that using delaying tactics would result in inter-communal violence. Such a sensitive issue as the Ayodhya dispute demanded a speedy resolution because it had the potential to seriously weaken the social fabric of the country, resulting in widespread riots and violence.

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<sup>231</sup> BR Agarwala, *Our Judiciary* (National Book Trust, New Delhi 1993) 198.

<sup>232</sup> India Civil Justice Committee (1925) Calcutta, Law Commission Report (1958) Fourteenth Report: The Reform of Judicial Administration, New Delhi: Ministry of law and Justice; Law Commission Report (1978) Seventy-Seventh Report: Delay and Arrears in Trial Courts, New Delhi: Ministry of law and Justice; Law Commission Report (1979) Seventy-Ninth Report: Delay and Arrears in High Courts and Other Appellate Courts, New Delhi: Ministry of law and Justice.

<sup>233</sup> BR Agarwala, *Our Judiciary* (National Book Trust, New Delhi 1993) 198.



Though a cursory study of the cases prove the violation of articles 14, 15 and 25 of the Constitution in many instances, the courts, through prevarication, prolonged the dispute. This has weakened faith in the courts and undermined democratic values. It has also destabilised both the rule of law and the principle of equal rights.

### 3.4.3. Failure to protect minority rights

Preamble of the Indian Constitution defines India as ‘a Sovereign, Socialist, Secular, Democratic, Republic.’<sup>234</sup> The framers recognised that in a multi-religious, multi-ethnic country like India, it was essential for religious harmony and for the social fabric of the society that independent India was governed by secular principles. These secular principles were the basis on which the fundamental human rights of all Indian citizens were to be protected, especially those of the minority groups.

From the days of independence, two very different understandings of secularism have competed for ideological dominance. The first one was ‘*dharma nirapeksata*,’ which was based on western understanding of secularism, proposing the separation of religion and politics. This was supported by Jawaharlal Nehru, first Prime Minister of India. The second view was ‘*sarva dharma sambhava*’, which rejected the idea of the separation of religion and politics and was based instead on the principle of the equal respect of all religions. This model was supported by Gandhi. It is this Gandhian understanding of secularism, that all religions should have equal respect, came to dominate legal and political thought in India.<sup>235</sup> Radhakrishnan observed that it is important that India remain a secular state to play its role within national and international life.<sup>236</sup>

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<sup>234</sup> The word ‘Secular’ was substituted by the Constitution (Forty-second Amendment) Act, 1976.

<sup>235</sup> AA Engineer, ‘Secularism in India: Theory and Practice’ in RC Heredia and E Mathias (eds), *Secularism and Liberation* (Indian Social Institute, New Delhi 1995) 40.

<sup>236</sup> S Radhakrishnan, *Recovery of Faith* (George Allen & Unwin, London 1956) 184. Radhakrishnan, the first President of India, observed ‘When India is said to be a Secular State, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes positive religion or that the State assumes divine prerogatives ... We hold that not one religion should be given preferential status ... This view of religious impartiality, or comprehension and forbearance, has a prophetic role to play in national and International life’.

The meaning of secularism, as contemplated by the Constitution, did not preclude religious protection; rather, it provided a sense of religious harmony.<sup>237</sup> One distinguishing feature of constitutional secularism in India is characterised by the state's promise that it will not identify itself with or be controlled by any single religion. In India, affirmative or positive discrimination has been written into the Constitution itself because it focuses not only on equality as a right available to all citizens, but also emphasises equality as a policy aimed at changing the structure of the society.<sup>238</sup> Jacobsohn defined Indian secularism as 'ameliorative secularism' because it tried to heal some of the inequalities existing in Indian society.<sup>239</sup>

During independence, the framers of the constitution struggled to establish equality among their citizens because religious hierarchy was so deeply embedded into the country's social fabric.<sup>240</sup> Hence, secularism is established as a basic structure of the Indian Constitution, and the courts are empowered to uphold this structure.

The legal dispute in Ayodhya centred on the question of property rights of the site, and became inextricably linked with the differing religious claims which led to continual conflict. Parikh observed that the principle of constitutional secularism permeates the Ayodhya situation, where the religious dispute culminated in a legal action brought by a few Hindus challenging property rights over the disputed site in Ayodhya.<sup>241</sup>

Protection of minority rights is embedded in the Constitution and delineated in Articles 29<sup>242</sup> and 30.<sup>243</sup> Though the word minority was not defined in the Constitution, the Supreme

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<sup>237</sup> MV Pylee, *India's Constitution* (Asia Publishing House, London 1962) 123.

<sup>238</sup> A Beteille, *Society and Politics in India: Essays in a Comparative Perspective* (Athlone, London 1991) 206-7.

<sup>239</sup> GJ Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University press, Princeton 2003) 94. Jacobsohn defines it as ameliorative since it seeks an amelioration of the social conditions of people long burdened by the inequities of religiously based hierarchies, while embodying a vision of inter-group comity whose fulfilment necessitates cautious deliberation in the pursuit of abstract justice.

<sup>240</sup> G Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP, Oxford 1966) 50.

<sup>241</sup> S Parikh, 'Enshrining a Secular Idol: A Judicial Response to the Violent Aftermath of Ayodhya' (2005) 37 Case W Res J Int'l L 85, 89.

<sup>242</sup> Indian Constitution art 29: (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds of religion, race, caste, language or any of them.

<sup>243</sup> Indian Constitution art 30: All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

Court in various cases<sup>244</sup> addressed this problem and showed that the protection of minorities was supported by the principles of secularism.

1980s and 1990s represent a new and ever widening ideological polarization within Indian Society. From 1984 onwards, it is alleged that the Congress party, in an attempt to remain in power, tacitly began to support the agenda of the *Sangh Parivar*.<sup>245</sup> After the 1986 court order to open the locks, the Muslim leaders organised a counter to the *Sangh Parivar*. This led to the communalisation of the Indian polity and now Indian state and society are witnessing an intense struggle between the bi-polar forces of Indian secularism and Hindu nationalism.<sup>246</sup>

Similarly, the judiciary also relinquished their responsibility to uphold secularism which is shown by their failures to provide speedy remedy to religious disputes, especially in the Ayodhya dispute. By allowing the Hindus to worship the idols of Ram inside the Babri Masjid, and failing to restore the mosque for the minority community, the courts constantly failed to protect secular principles and denied minority rights to own a sacred site and to worship in it.

In the Ayodhya dispute, when the Supreme Court was approached by the Muslims in 1986, to suspend the order opening the locks in the Babri Masjid, it declined to intervene and asked the parties to maintain the 'status quo'. In 1989 again the Supreme Court failed to prevent the *Shilanyas*, laying foundation for the Ram temple adjacent to the Babri Masjid. In November 1992, the court failed to punish the Chief Minister of UP for violating the orders of the court in a contempt petition before demolition.

Subsequent to the Faruqui case,<sup>247</sup> the Court failed to strike down section 7 of the Acquisition of Certain Lands in Ayodhya Act. The majority of judges in this case rejected the argument that Section 7, which in effect permitted the continuance of the *puja* of the idols, revealed favouritism of the Hindu community and was anti-secular. Though the majority in the Supreme Court said that the demolition was a 'national shame', it continued

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<sup>244</sup> *In Re Kerala Education Bill* AIR 1958 SC 956, 976-7; *Shri Krishna v Gujarat University* AIR 1962 Guj 88; *DAV College v State of Punjab* AIR 1971 SC 1731, 1744.

<sup>245</sup> Human Rights Watch, *Playing the "Communal Card": Communal Violence and Human Rights* (HRW, New York 1995) 21.

<sup>246</sup> IH Malik, 'Beyond Ayodhya: Implications for Regional Security in South Asia' (1993) 24 *Asian Affairs* 290, 290.

<sup>247</sup> *Ismail Faruqui v Union of India and Others* AIR 1995 SC 605.

to allow worship in the makeshift temple, which showed that the Supreme Court had acted against the interests of minorities. In this case, the minority judgement held that ‘to condone the acquisition of a place of worship in circumstances in which it was demolished is to efface the principle from the Constitution’.<sup>248</sup>

In the above case, the Supreme Court noted that ‘the perpetrators of this deed, struck not only against a place of worship, but also at the principles of secularism, democracy and the rule of law enshrined in the Constitution’.<sup>249</sup> Yet, despite this recognition of the damage done to secular principles in the Ayodhya dispute, the Supreme Court, or for that matter, the High Court, also have failed to restore the site or access to it to the minority Muslim community.

Through repeated court orders to maintain status quo, particularly the 1994 Supreme Court order in the Faruqui case, the courts violated the principle of secularism, by allowing the Hindus to worship at the makeshift temple. Parikh argued that the court’s definition of secularism contradicted the Indian definition of secularism as ‘treating all religions equally’.<sup>250</sup> The Supreme Court order failed to acknowledge that the interim injunction in 1950 and the 1955 High Court order clearly prohibited any form of worship except by the Hindu priests at the Babri site. This order was defied by lay Hindus who continued to worship there. It is important to understand that the court allowed the Hindu worship to continue while precluding Muslim worship near the site.

McHugh states that the disconnection between the language of secularism set out by the Supreme Court and the action actually taken was a result of the court’s own biases.<sup>251</sup> He further alleged that ‘one aspect of this problem is the continued, practical dominance of members of upper castes within the political, social, economic, and legal institutions of India’.<sup>252</sup> Jacobsohn argued in the same manner when he observed ‘secularism appears in

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<sup>248</sup> AG Noorani (ed), *Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol II, 271.

<sup>249</sup> *Ismail Faruqui v Union of India and others* AIR 1995 SC 605.

<sup>250</sup> S Parikh, ‘Enshrining a Secular Idol: A Judicial Response to the Violent Aftermath of Ayodhya’ (2005) 37 Case W Res J Int’l L 85, 98.

<sup>251</sup> JT McHugh, *Comparative Constitutional Traditions* (Peter Lang, Oxford 2002) 105.

<sup>252</sup> *Ibid.*

the form of a radical majoritarian in the service of an assimilationist agenda'.<sup>253</sup> It may be observed that in the Faruqui judgement, supposedly neutral judges fell victim to their religious bias when deciding a dispute involving Hindus and Muslims.

Secularism is a necessity to protect the minority rights in a multi-religious country like India. Protection of minorities is the hallmark of a civilised nation. In the words of Lord Acton 'the most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities'.<sup>254</sup> The special privileges (Article 25-30) given to the minorities in the Constitution were opposed by the *Sangh Parivar* from the early days of independence as minority appeasement. Soli Sorabjee, former attorney General of India, observed 'these guarantees are essential in a democratic and pluralistic polity' and quoted Franklin Roosevelt, stating 'no democracy can long survive which does not accept as fundamental to its very existence the recognition of the rights of minorities'.<sup>255</sup>

The Supreme Court often stated that upholding minority rights is a sacred obligation of the courts.<sup>256</sup> Yet, some of the judgements restricting the rights of minorities suggest that this 'sacred obligation' is no longer a constitutional priority of the courts.<sup>257</sup> Minority rights are human rights. Articles 25-30 resemble Article 27 of the ICCPR<sup>258</sup> which guarantee minority rights and differential treatment. The protection of minorities within a state helps to guarantee justice, democracy, stability and peace.<sup>259</sup> However, the Ayodhya dispute has

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<sup>253</sup> GJ Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University press, Princeton 2003) 97.

<sup>254</sup> Lord Acton, 'The History of Freedom in Antiquity' cited in IA Ansari (ed), *Readings on Minorities* (Institute of Objective Studies, New Delhi 1996) Vol 1, 165.

<sup>255</sup> SJ Sorabjee, 'Minorities: National and International Protection' in IA Ansari (ed), *Readings on Minorities* (Institute of Objective Studies, New Delhi 1996) Vol 1, 166.

<sup>256</sup> *In Re Kerala Education Bill* AIR (1958) SC 956, 986. The Supreme Court observed: Our Constitution has guaranteed certain cherished rights of the minorities concerning their religion ... So long as the Constitution stands as it is and is not altered, it is the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own.

<sup>257</sup> For example, *Azeez Basha v Union of India* AIR 1968 SC 662 (known as Aligarh Muslim University Case); 1663; *St Xavier's College v Union of India* AIR 1974 SC 1389, 1398; *St Stephen's College v Union of India* AIR 1992 SC 1630; and *Rev Stanislaus v State of Madhya Pradesh* AIR 1977 SC 908 (known as conversion case).

<sup>258</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27: In those States in which ethnic, religious, linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language.

<sup>259</sup> SJ Sorabjee, 'Minorities: National and International Protection' in IA Ansari (ed), *Readings on Minorities* (Institute of Objective Studies, New Delhi 1996) Vol 1, 175.

highlighted the failure of the courts in protecting the rights of the minority and their sacred sites.

#### 3.4.4. Failure to enforce court judgements

This section examines how the failure by the UP State Executive<sup>260</sup> in enforcing the court judgements exacerbated the dispute. This will show how the *Shilanyas*, and the subsequent acquiring of the disputed land by the BJP government in UP, was used by the *Sangh Parivar* as an impetus for the destruction of the mosque.

In 1986, the High Court ordered that the status quo should be maintained in the disputed land, and the order covered not only the disputed mosque but also the adjoining land. To conduct the *Shilanyas* ceremony the *Sangh Parivar* chose the plot next to the Babri Masjid in a total defiance of the court order. When the Muslims objected to this move, the Union Home Minister Buta Singh came to Lucknow on 8 November 1989 to meet the VHP leaders to request that the site be shifted to a different place, but the VHP refused. To please the *Sangh Parivar*, the state and union governments allowed the *Shilanyas* within the disputed area.<sup>261</sup> The state government did not stop the ceremony, though it knew that it was a clear violation of the court order which prohibited construction activity within a disputed area where status quo ought to be maintained.

In 1991, the BJP government in UP acquired 2.77 acres of land adjacent to Babri Masjid<sup>262</sup> and allowed the Hindu priests and devotees to take charge of it. By allowing the destruction of the old structures, including the temples, it failed to implement the High Court order to maintain status quo. In February 1992, the *kar sevaks* began the construction of a wall enclosing a large area around the Babri Masjid, including the acquired land, despite the High Court order which stated that no permanent structure was to be built on the site.<sup>263</sup> The state government once again failed to stop the construction by remaining silent, though VHP and other militant organisations announced that it was a step towards the construction

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<sup>260</sup> 'State Executive' includes the State Chief Minister, Cabinet, local administration and the police.

<sup>261</sup> AG Noorani (ed), *Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol I, xi.

<sup>262</sup> Vide Notification No 3814/XLI-33-86, dated 7 October 1991 under Sub-section (1) of Section 4 of the Land Acquisition Act, 1894.

<sup>263</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 24.

of the Ram Temple. Besides, despite the repeated requests by the union government to make available the development plans for construction work, the state government failed to comply.<sup>264</sup>

In March 1992, the state government leased out about 42 acres of land in the vicinity of the Babri Masjid complex to the *Ram Janmabhumi Nyas* (Trust), on perpetual lease, for the implementation of the Ram Story Park project.<sup>265</sup> This was in contravention of the court order which stated that the acquired land shall not be transferred or alienated.<sup>266</sup>

Notwithstanding the court orders, the VHP and *Ramjanmabhumi Nyas* started *kar seva* in July 1992. When the construction work was being carried out by the devotees and *sadhus*, the state government disowned responsibility for what had been done and told the High Court that it was not aware who was doing the work and who was in charge of it. Given that thousands of devotees were working on the disputed site, for approximately a month, it was disingenuous of the state government to claim that they had no knowledge of who was carrying out the construction. When the High Court intervened to stop the construction, the state government on 16 July 1992 filed an affidavit which declared that, 'if the devotees are stopped they may cause damage to the mosque.'<sup>267</sup> This would suggest that the state had lost its authority to rule because it was not able to protect its people and places of worship. Godbole questioned the transparency of the state government in revealing the construction plan, either to the High Court or to the Parliamentary Committee or to the Commission appointed by the Supreme Court or to the Government of India.<sup>268</sup>

The National Integration Council (NIC) and the few members of Parliament who visited Ayodhya recommended that the union government should advise the state government not to proceed any further in changing the nature of the said property.<sup>269</sup> The Commission appointed by the Supreme Court submitted its report in September 1992 which remarked

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<sup>264</sup> Government of India, *White Paper on Ayodhya* (GOI, New Delhi 1993) 47.

<sup>265</sup> 'The deed of Lease dated 20 March 1992 between the UP Government and the *Shri Ramjanmabhumi Trust*' cited in AG Noorani (ed), *Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) 352-61.

<sup>266</sup> The Supreme Court order on 15 November 1991 in Writ Petition (C) no 1000/91 with Writ Petition (C) no 977 and no 972 of 1991.

<sup>267</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 109.

<sup>268</sup> M Godbole, *Unfinished Innings: Recollections and Reflections of a Civil Servant* (Orient Longman, New Delhi 1996) 338.

<sup>269</sup> Government of India, *Report of the Delegation of the Members of the Standing Committee of the National Integration Council and Members of Parliament to Ayodhya* (April 1992) 7.

that ‘the magnitude of the work is such that it could not have been carried out without the use of construction equipment’.<sup>270</sup>

When *Sangh Parivar* declared 6 December 1992 as the day for *kar seva*, the UP government made little effort to arrange security for the disputed site despite the overwhelming evidence that attempts to destroy the Masjid would be made on that day. There was not much security for the Muslims in Ayodhya and Faizabad.<sup>271</sup> According to the Citizen’s Tribunal report, the one act that most weakened the security of the disputed shrine was the state government’s decision not to allow the police and paramilitary to use force on the *kar sevaks* under any circumstances. This violated the assurance that the UP government had given to the courts.

In the contempt petition before the Supreme Court in November 1992, the UP government in its affidavit of 27 November 1992 affirmed once again that no construction would be allowed and the mosque would be protected. But *Organiser*<sup>272</sup> revealed the strategy of the state government by observing that ‘it was a strategy that the UP government filed an affidavit in the Supreme Court assuring the latter that the government would not allow violation of the court orders’.<sup>273</sup> After hearing of the assault on the Babri Masjid, the Supreme Court issued a *suo moto* contempt notice and while hearing arguments on an application (IA No 5) observed,

A grave situation has emerged by the developments that have occurred owing to the violations of the undertakings and assurances given by the state government to the court. It is a great pity that a constitutionally elected government could not discharge its duties in a matter of this sensitiveness and magnitude.<sup>274</sup>

During the demolition, police stood complacent. They did not even make a human chain to prevent the few hundred persons who first sought to break the cordon.<sup>275</sup> The correspondent of *The Statesman* observed that ‘the police stood by, watched and even cheered as the

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<sup>270</sup> Report of the Commission Appointed Vide Order of the Supreme Court dated 5 August 1992 on IA no 3 in Contempt Petition no 102/92 in Writ Petition (Civil) no 1000/91.

<sup>271</sup> Interview with Z Jilani, Member of All India Muslim Personal Law Board (AIMPLB), Advocate, Lucknow High Court (Lucknow 9 February 2006).

<sup>272</sup> *Organiser* is the weekly published by the RSS from New Delhi.

<sup>273</sup> AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol II, 21-2.

<sup>274</sup> In Contempt Petition no 97 of 1992 in Writ Petition no 977 and no 972 of 1991.

<sup>275</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 455.



mosque came down and so did the leaders of the *Bharathiya Janatha Party*'.<sup>276</sup> The police even helped the work of demolition through direct participation, according to a press reporter.<sup>277</sup>

This pattern was repeated in dealing with incidents of arson, looting and destruction in the township.<sup>278</sup> It needs to be mentioned that there was no lack of information about the developing situation on the ground. Ms Anju Gupta, then additional Superintendent of Police, Faizabad, made the statement that 'all police officers on duty in Faizabad and Ayodhya during the *kar seva* of December 1992 were aware of the fact that the disputed mosque would be attacked by the *kar sevaks*, a day before it was demolished'. This she stated before the Liberhan Inquiry Commission probing the Babri Masjid demolition case.<sup>279</sup> The Citizen's Tribunal report points out that '... the DM was regularly seeking instructions from headquarters. A senior official has claimed that the only instruction issued from the State Home Department on the afternoon of 6 December, was to maintain peace without resort to firing.'<sup>280</sup>

The failure to execute the court orders can clearly be established from the above presentation. Had the UP state government stood by the court orders and kept up its promise to the courts and to the union government, in all probability, the destruction of the disputed sacred site would have been averted and communal harmony in the country would not have deteriorated so much. The partisan manner in which the UP government acted and connived with the communal forces destroyed not only the mosque but also the rights of the minorities so fundamental to the Indian Constitution.

### **3.4.5. Failure of the union government to act against the state government**

This section outlines the power of the union in protecting the constitutional order throughout India. As seen in the second chapter, a defining characteristic of any federal system is a hierarchy of governments with a delineated scope of authority between the national and sub-national governments, so that each government is autonomous within its

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<sup>276</sup> 'The Death of a dream' *The Statesman* (New Delhi 7 December 1992).

<sup>277</sup> *The Indian Express* (Bombay 6 December 1992).

<sup>278</sup> 'Minority desert Ayodhya' *The Telegraph* (Calcutta 7 December 1992).

<sup>279</sup> *The Asian Age* (New Delhi 11 May 1994).

<sup>280</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993)79.

own sphere of authority.<sup>281</sup> Part of the purpose of federalism in India concerns the problem of maintaining harmony among different ethnic and religious groups.<sup>282</sup> India is a pluralist country, which has represented within it all of the world's major religions,<sup>283</sup> with twenty-two recognized languages, and countless dialects. Despite this, it was able to develop a single national constitution. The Indian model is based upon a strong union government with state governments that are not sovereign, but which have constitutionally enumerated powers.<sup>284</sup>

If the constituent states fail to adhere to the constitutional authority or suffer from internal disturbances, the union government is empowered to use its authority to re-establish democratic rule within that state under Article 356 of the Constitution.<sup>285</sup> Failure of the union government in the Ayodhya dispute in enforcing Article 356 can only be properly evaluated by understanding how the federal principles work within the relationship between the union and state. Before independence, provincial governments functioned with a great degree of autonomy from federal control. After independence, India maintained the system of federalism, but changed it dramatically by establishing strong union government, in part due to concerns over aggrandized political power in the provinces.<sup>286</sup>

The union has important unilateral powers with respect to state powers.<sup>287</sup> One of the reasons that the framers of the Indian Constitution created a strong union was that it could protect minority rights and defuse the political and economic tensions that might arise in such a heterogeneous nation.<sup>288</sup> Horowitz, a political scientist, argues that federalism helps

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<sup>281</sup> G Montinola and others 'Federalism, Chinese style: The Political Basis for Economic Success in China' (1995) 48 World Pol 50, 55.

<sup>282</sup> S Parikh and BR Weingast, 'A Comparative Theory of Federalism: India' (1997) 83 Va L Rev 1593, 1614.

<sup>283</sup> HG Coward, 'Introduction' in HC Coward (ed), *Modern Indian Responses to Religious Pluralism* (State University of New York Press, New York 1987) ix.

<sup>284</sup> Part XI (Articles 245-263) of Indian Constitution delineates the relations between the Union and States.

<sup>285</sup> Indian Constitution art 356 confers powers on the President of India to dismiss the duly elected state government if he is satisfied 'on receipt of a report from the Governor of a state or otherwise' that there is a breakdown of constitutional machinery in that state. In the exercise of the emergency powers, however, the role of the governor is crucial.

<sup>286</sup> NA Kemkar, 'Environmental Peacemaking: Ending Conflict between India and Pakistan on the Siachen Glacier through the Creation of a Trans-boundary Peace Park' (2006) 25 Stan Env'tl L J 67, 70.

<sup>287</sup> A Chanda, *Federalism in India: a Study of Union-State relations* (George Allen & Unwin, London 1965) 68-72.

<sup>288</sup> G Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, Oxford 1966) 189-91.

avoid conflict in societies that are polarized geographically and provides the protection of minorities in divided societies.<sup>289</sup>

Under the Indian Constitution, the federal and state governments have enumerated powers. While many of the aspects of a strong federal authority are widely accepted as positive features of the Indian political structure, certain powers held by the federal government, like the use of Article 356, have been questioned and have created controversy. Emergency powers granted under article 356 were often used for political reasons by the union government, especially when the state government belonged to another political party.<sup>290</sup>

When the state government of UP violated the provisions of the Constitution, especially articles 14, 15, and 25, the union government had the power to implement President's Rule under Article 356 to maintain public order and restore constitutional democracy which includes the rule of law and the protection of secularism. From 1991, the increased communal tension resulted in riots which affected the social fabric of the nation.<sup>291</sup> Questions should be raised about why the Union government did not implement article 356 to protect the principles of secularism and establish the rule of law which were undermined in the continual conflicts in UP in 1992. In the *Bommai* case, the Supreme Court declared that the failure to act in accordance with the substantive provisions of the constitution, in this case, the commitment to secular rule, was sufficient to trigger the emergency powers of the union government.<sup>292</sup>

When the BJP state government in UP tried to sabotage the Constitution by extending its support to the *Sangh Parivar*, who pledged to build a Hindu temple after destroying the mosque, the union government should have acted to protect the Constitution and the rule of law. The state repeatedly failed to adhere to the union government's advice to maintain neutrality and instead ignored its advice. Moreover, it failed to implement the highest court's order to maintain the status quo in Ayodhya. For instance, the commission

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<sup>289</sup> DL Horowitz, *Ethnic Groups in Conflict* (University of California Press, Berkeley 1985) 646-48.

<sup>290</sup> For instance, the Janata Government, when it came to power in 1977, dismissed nine Congress state governments, and when Indira Gandhi's Congress came back to power, it dismissed nine opposition state governments in 1980. So, given the law and order situation which existed in UP in 1992 it seems inexplicable that the Union Government did not dismiss the UP State Government.

<sup>291</sup> A Nandy and others, *Creating a Nationality: The Ram Janmabhumi movement and the Fear of the Self* (OUP, New Delhi 1995) 42.

<sup>292</sup> *SR Bommai v Union of India* AIR 1994 SC 1918.

appointed by the Supreme Court to examine the nature of the construction work done in Ayodhya submitted its report in September 1992. The commission observed that 'the magnitude of the work is such that it could not have been carried out without the use of construction equipment such as water tanks, cement concrete mixers, concrete vibrators, earth moving equipment, etc.'<sup>293</sup>

Again the *Sangh Parivar* leaders openly advocated the destruction of the Babri Masjid and organized *kar sevaks* to build a Ram temple in its place. For instance BJP president Advani declared on 2 December 1992 that 'all *kar sevaks* will perform physical activity on the 2.77 acres and not merely sing hymns'.<sup>294</sup> The Supreme Court during its hearing on 25 November 1992 clarified that the union government would be quite free to make its own assessment and to proceed with whatever action it thought fit in the dispute.<sup>295</sup> Godbole explained that 'a contingency plan for a take-over of the complex and imposition of President's rule was kept ready but there was no clear view within the government on whether the union should get fully involved'.<sup>296</sup> This revealed the reluctance of the union government to take strong action against the state government which continued to violate the constitutional values.<sup>297</sup>

As it has been shown, the government had the necessary constitutional measures to take over the administration of the state, but it did not demonstrate the political will and direction.<sup>298</sup> The union government's arguments justifying its decision not to impose President's Rule prior to 6 December 1992 were not convincing. The White Paper on Ayodhya by the Government of India said that when a state gave assurances before the Supreme Court, taking action would not be consistent with the provisions of the

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<sup>293</sup> Report of the Commission appointed vide order of the Supreme Court dated 5 August 1992 on IA no 3 in Contempt Petition no 102/92 in Writ Petition (civil) no 1000/91.

<sup>294</sup> *The Statesman* (Calcutta 3 December 1992).

<sup>295</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 110.

<sup>296</sup> M Godbole, *Unfinished Innings: Recollections and Reflections of a Civil Servant* (Orient Longman, New Delhi 1996) 347.

<sup>297</sup> Ibid 362. Godbole observes that the contingency plan, both for July and November 1992 contemplated the Government of India stepping into the shoes of the state government and taking over the administration. Since the formalities of issuing a notification under Article 356 was a time-consuming process, it was felt advisable that action should be taken under Article 355 at midnight of the selected day, to be followed immediately by the imposition of President's rule under Article 356.

<sup>298</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 83.

Constitution.<sup>299</sup> This argument was totally unconvincing since the UP government had already provided sufficient grounds for its own dismissal under Article 356.

The inaction on the part of the Government of India indicated a lack of direction, a lack of policy and a lack of initiative.<sup>300</sup> When the Ayodhya dispute became a major issue in 1984, the union government could have expedited the judicial resolution.<sup>301</sup> By not doing this, the union government allowed the exacerbation of a problem, with fatal consequences for thousands of people, leading to an unprecedented assault on the Constitution, law and secular traditions.

All the union governments after 1986, in an effort to settle the Ayodhya dispute, entered into dialogue only with religious organizations like the VHP and the *Ramjanmabhumi Nyas* as representative of the Hindus, and the AIBMAC (All India Babri Masjid Action Committee) as representative of the Muslims and not with any secular groups. Consequently, this process legitimized the communal organizations, their politics and ideology. This had and still has serious repercussions for the secular and democratic process in the country. As Burlet observed, the possibilities of different voices within the communities were silenced by recognising only communal organisations as the sole representatives of the respective communities.<sup>302</sup>

The Union Government had already got the unequivocal support of all the non-BJP parties for the implementation of Article 356. The resolution of the NIC meeting extended 'its whole-hearted support and cooperation in whatever step the Prime Minister considers essential in upholding the Constitution and the rule of law, and in implementing the Court's orders'.<sup>303</sup>

Even on 6 December 1992, the union government could have acted and averted the destruction of the mosque. According to the official account, the Home Ministry received

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<sup>299</sup> Government of India *White Paper on Ayodhya* (GOI, New Delhi 1993) 11.

<sup>300</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1993) 80-88.

<sup>301</sup> Indian Constitution art 356: 'Parliament may by law make provision for conferring upon the Supreme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the court effectively to exercise the jurisdiction conferred upon it by or under the Constitution.'

<sup>302</sup> DS Burlet, 'Challenging Ethnic Conflict: Hindu-Muslims Relations in India 1977-1993' (PhD Thesis, Department of Peace Studies, University of Bradford 1997) 1.

<sup>303</sup> Resolution from National Integration Council meeting held on 23 November 1992. This meeting was boycotted by the BJP.

information at 12.00 noon about the attack on the Babri Masjid, yet despite this, a Cabinet meeting was only convened at 6.00 pm and President's Rule was proclaimed only at 21.10 pm.<sup>304</sup> The delay in convening the Cabinet meeting and taking a decision on imposing President's Rule was crucial. The breakdown in the law and order situation allowed for the continued assault and destruction of the Masjid, the clearing of its debris, as well as work on the building of a platform for the installation of the Ram and other idols. The *kar sevaks* were therefore given vital time to complete their assault on the Babri Masjid and the Muslims, and to give a wholly new dimension to the problem by building the foundation of the proposed *sanctum sanctorum* of a Ram Temple. This delay also permitted increased and unhindered attacks on minorities and journalists.

The union government enjoyed enough powers under the Constitution to prevent what ultimately happened in Ayodhya. Had it used Article 356, it would definitely have strengthened the federal system and averted massive human rights violations. By allowing the state government to function, it indirectly provided a free hand to the communal outfits to whom the state government of UP was quite sympathetic.

#### **3.4.6. Failure to punish those responsible for demolition**

The prosecution and conviction of criminal cases raise different issues from those of civil cases. Civil wrongs are confined mainly to individuals and seldom affect the community at large. That is why, in a criminal case, the state is authorized to pursue offenders on behalf of the victims to ensure the rule of law.<sup>305</sup> When speedy justice is not meted out to offenders in criminal actions, it raises law and order problems and affects the security of the people. While making changes in the criminal procedure in 1973, the Indian Parliament observed that 'delay in investigation and trial is harmful not only to the individual concerned but also to the society.'<sup>306</sup> Keeping to this lofty ideal, this section analyses how

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<sup>304</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1994) 84.

<sup>305</sup> RC Nigam, *Law of Crimes in India* (Asia Publishing House, London 1965) 27-8.

<sup>306</sup> SD Balsara, 'Criminal Procedure' in J Minattur (ed), *The Indian Legal System* (Tripati NM, Bombay 1978) 210.

the courts failed to punish those responsible for the demolition of the Babri Masjid under existing criminal laws.

The criminal justice system in India is executed by four sub-systems which include the police, the prosecution, the courts and the corrective agency. Each of these bodies have their own role to play in bringing the accused to trial, and any failure in their responsibility can result in a miscarriage of justice which was exemplified in the Ayodhya dispute. In this regard, the Constitution clearly states under Article 21 that inordinate delay by the state in bringing the accused to trial violates Article 21.<sup>307</sup> Assurance of a fair trial is the first imperative of the dispensation of justice.<sup>308</sup>

In the Ayodhya dispute, after the demolition, criminal suits were filed against the *kar sevaks* and some of the leaders of the *Sangh Parivar*. Two First Information Reports (FIRs) were filed by the police on the day of demolition. The first FIR in Crime No. 197/92 did not name the accused, but it booked 'lakhs'<sup>309</sup> of unknown *kar sevaks* under various provisions of the Indian Penal Code (IPC) and the investigation was assigned to the Central Bureau of Investigation (CBI) on 13 December 1992.<sup>310</sup> Later, another FIR in Crime No. 198/92 was lodged, naming eight leaders of the *Sangh Parivar*<sup>311</sup> as the accused in respect of their hate speeches<sup>312</sup> on the morning of 6 December 1992, and the investigation was assigned to CB-CID,<sup>313</sup> the UP state police. Thus, there were, two distinct but related cases initiated at one and the same police station in respect of the same offences committed on the same day.

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<sup>307</sup> *State of Maharashtra v Champalal* AIR 1981 SC 1675; *Rudal Shah v State of Bihar* AIR 1983 SC 1096

<sup>308</sup> *Police Commissioner, Delhi v Registrar Delhi High Court* AIR 1997 SC 95.

<sup>309</sup> One lakh is equivalent to one hundred thousand.

<sup>310</sup> Under IPC Section 395 (dacoity); 397 (robbery or dacoity with attempt to cause death or grievous hurt); 332 (causing hurt to deter public servants); 337 (hurt by endangering life or personal safety of others); 338 (grievous Hurt); 295 (injuring or defiling place of worship with intent to insult the religion of any class); 297 (trespass in any place of worship) and 153A (promoting enmity between different groups on grounds inter alia of religion).

<sup>311</sup> Eight politicians were named because their identity was well known – LK Advani, MM Joshi, Uma Bharathi, Ashok Singhal, Giriraj Kishore, VH Dalmia, Vinay Katiyar and Sadhvi Rithambara. LK Advani was President of the BJP party.

<sup>312</sup> In Crime no 198 the eight politicians were charged under Section 153 A, Section 153B (imputations prejudicial to national integration) and 505 (statements conducing to public mischief).

<sup>313</sup> State Crime Branch Criminal Investigation Department (CB-CID) investigates crimes within a State.

On 16 December, after consulting the High Court, the state government set up a Special Court of Judicial Magistrate<sup>314</sup> to try only the No. 198/92 case. The state police submitted to the Special Court a charge-sheet against the eight politicians, on 27 February 1993, and the Court took cognizance of the case on 1 March 1993. Later the state requested the union government to entrust case No.198 as well as forty-seven other related cases<sup>315</sup> to the CBI.<sup>316</sup> Subsequently, the state government established a Special Court<sup>317</sup> for trial in the demolition cases in No. 197/92 and the other 47 related cases. The High Court appointed Vijay Verma to preside over the Special Court and it was before him that on 5 October 1993 the CBI filed the consolidated charge-sheet<sup>318</sup> against the eight political leaders in crime No. 198.

On 27 August 1994, the Special Judicial Magistrate found that a *prima facie* case did exist against the accused and committed the case<sup>319</sup> to the Sessions Court for a full trial.<sup>320</sup> Against this order, the respondents filed Criminal Revision Petitions in the High Court at Lucknow.<sup>321</sup> Every single argument against the order for framing charges was rejected by

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<sup>314</sup> CrPC (n 103) s 11 empowers the State to set up a special court in respect of 'any particular case or particular cases' but only 'after consultation with the High Court'. Its presiding officer is appointed by the High Court, not by the State Government.

<sup>315</sup> Forty-seven other cases include 197/92 and forty-six other FIRs with respect to cognizable offences and one FIR to non-cognizable offences (NCR no 57 of 1992, under sections 323,427 IPC) were lodged at Police Station, *Ramjanmabhumi* on 6 December 1992. These forty-six cases are related to offences committed against media persons. AG Noorani (ed), *The Babri Masjid Question 1528-2003: A Matter of National Honour* (Tulika Books, New Delhi 2003) Vol II, 125-27.

<sup>316</sup> CBI Case no 48/93.

<sup>317</sup> The Special Court had to try the offences investigated by the CBI. The schedule listed forty-eight cases specifically. They included no 197 and forty-seven other cases, but No 198 was not included though it had also been entrusted to the CBI on 26 August. The reason was that this case was pending before the Special Judicial Magistrate, at Rae Bareli, UP.

<sup>318</sup> The CBI filed the charge-sheet in the court of Special Magistrate at Lucknow on 5 October 1993. Forty persons have been cited as accused in cases involving offences of criminal conspiracy, intentional destruction and defiling of a place of worship, promoting enmity between groups on grounds of religion, insulting religious feelings, criminal trespass and intimidation of public servants. The charge-sheet concludes that 'from the above mentioned facts and circumstances a *prima facie* case is made out against accused No 1-40 in respect of the offences which were committed in the course of same transaction'.

<sup>319</sup> Sessions Case no 344/94 registered *vide* FIR no 197/92.

<sup>320</sup> The Additional Sessions Judge JP Srivastava, in his order of 9 September 1997 stated that 'on the basis of evidence on record, I find a *prima facie* case to charge the accused persons and I charge them under the aforesaid offences.'

<sup>321</sup> Criminal Revision no 199 of 1997, no 201 of 1997, no 211 of 1997 and no 255 of 1997.



Justice Bhalla in the High Court, save the one regarding the careless amendment of 8 October 1993, adding Case No. 198 to the rest before the Lucknow Court.<sup>322</sup>

On 4 May 2001, as a direct result of the High Court's ruling, the Sessions Judge, Srikanth Shukla, dropped further any proceedings against twenty one of the accused, while twenty eight other accused were ordered to stand trial.<sup>323</sup> Judge Shukla specifically referred to Justice Bhalla's ruling and observed, 'although this defect in the Notification was curable and the state government had opportunity to rectify the same, it had not rectified the said mistake in the Notification'. This neglect from the government was deliberate because the state government was headed by the UP Chief Minister, Rajnath Singh, (the present National President of BJP).

On 16 June 2001, the CBI requested the UP government to issue a fresh Notification to cure the defect, after consulting the High Court. The government neither issued fresh Notification nor appealed against the High Court's judgment. Eventually, Special Leave Petitions were filed in the Supreme Court by Mohammad Aslam Bhure, Society for Justice, and a few concerned citizens.

In another action, on 30 May 2003, the CBI filed a supplementary charge-sheet against Advani and others in case No.198/92. However, it should be noted that the CBI dropped the main charge of conspiracy, which had been levelled against the accused in explicit terms in the consolidated charge-sheet of 5 October 1993, which had been filed immediately after the demolition of Babri Masjid.<sup>324</sup> Also the videos, produced by the CBI in the court, did not show any of the inflammatory speeches from the day of demolition.<sup>325</sup>

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<sup>322</sup> Since case no 198 was pending before the Rae Bareilly court, the Notification of 9 September had to be amended to join this case with the rest. That was done by an amending Notification on 8 October, but, this time, without consultation with the High Court, which was a careless mistake. On 11 February 2001, Justice Bhalla of Allahabad High Court struck down this amendment since it did not comply with the essential safeguard of consultation with the High Court. Having enforced the law, he repeatedly stressed that the defect was 'curable'. Another Notification can be issued by the UP Government after consultation with the High Court.

<sup>323</sup> This took place in the cases of Sessions Trial no 344/94 and Sessions Trial no 749/96.

<sup>324</sup> The charge-sheet of 1992 included the grave and crucial charge of conspiracy. A decade later, the same investigation and prosecution agency, the CBI excluded it in 2003. On 30 July 2003, the CBI screened video films before the court that did not show any of the eight accused, Advani included, delivering inflammatory speeches at Ayodhya in the morning of the mosque's destruction.

<sup>325</sup> *The Telegraph* (Calcutta 30 July 2003).

Since the conspiracy charges were dropped, the Special Judicial Magistrate passed an order for the discharge of L.K. Advani on 19 September 2003. No revision was filed by the CBI against the discharge of L.K. Advani, but the Muslim Personnel Law Board filed a Criminal Revision in the High Court against the discharge order. After hearing the revisionist's counsel, the judge proceeded to hear the revision on merits and ordered for the admission of the revision. Fourteen years after the demolition of the Babri Masjid, the criminal cases are still in the preliminary stage and the accused have neither been punished nor acquitted.

The above is a brief chronology of the criminal cases in the Ayodhya dispute. The FIRs filed by the police after the demolition named various leaders of the *Sangh Parivar*<sup>326</sup> for inciting the *kar sevaks*, who were responsible for the criminal acts of destroying the mosque and subsequent riots. The punishment for such crimes is clearly mentioned in the Criminal Codes of IPC and CrPC. Though abounding evidence existed, the trial remains in its preliminary stage, mostly because of the influence of the BJP over the investigative agencies, and the negligence of the courts.

The criminal laws provide the government with the resources to bring the accused to speedy trial. But in the case of Ayodhya, a number of the accused became Ministers in the union government. For example, L.K. Advani became the Deputy Prime Minister and Home Minister. In his capacity as Home Minister, Advani was in charge of the CBI, responsible for bringing to justice those accused in the demolition case. But it is alleged that Advani made the CBI drop the main charge of conspiracy, and was discharged by the court. Until 2004, there was not much improvement in the trial. According to Khaliq Ahmad Khan,<sup>327</sup> the attitude of the CBI has changed since the fall of the BJP government. Now the trial in the demolition case has been adjourned to 29 August 2007.<sup>328</sup>

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<sup>326</sup> Eight leaders were named because their identity was well known – LK Advani, (Former BJP President) MM Joshi (BJP), Uma Bharathi (BJP), Ashok Singhal (President, VHP), Giriraj Kishore, (VHP) VH Dalmia (General Secretary, VHP) Vinay Katiyar (President, Bajrang Dal) and Sadhvi Rithambara, leader, *Durga Vahini* a militant Hindu Women's organization.

<sup>327</sup> Interview with Khaliq Ahmad Khan, Convener of Helal Committee and Chairman of Ayodhya - Faizabad Study & Research Centre (Faizabad 10 February 2006). He informed about his current negotiations with Hindu and Muslim leaders to bring out an out of court settlement.

<sup>328</sup> Sify News, 'Ayodhya Case Adjourned till 29 August' <<http://sify.com/news/fullstory.php?id=14512372>> accessed 18 August 2007.

An Enquiry Commission was appointed in 1992 to investigate the demolition and although it was expected to submit its report within one year, it has not completed its investigation after fourteen years. This delay was caused by some of the accused who, as already noted above, became ministers in the BJP union government and apparently failed to co- operate with the commission.<sup>329</sup>

The failure to punish those involved in the demolition invalidates all the proclamations of the Supreme Court about the right to a speedy trial.<sup>330</sup> The dispensation of justice based on established legal provisions should be impartial. The concept of judicial impartiality was seriously damaged by the courts in the Ayodhya dispute. The Supreme Court observed in the Chambalal case, ‘it is one of the sad and distressing features of our criminal justice system that an accused person, resolutely minded to delay the day of reckoning, may quite conveniently and comfortably do so’.<sup>331</sup> In the Ayodhya dispute, various leaders of the *Sangh Parivar* successfully manoeuvred the process of law to delay their trial. This has granted them liberty to threaten public order by their inflammatory speeches, inciting further disunity and hatred among the communities in dispute.

When courts fail to punish the perpetrators of any crime, the confidence the public have in the legal institutions may be at stake. In the Ayodhya dispute, the criminal actions of the members of the *Sangh Parivar* were unpunished. Hence, the Ayodhya dispute has turned out to be a *cause celebre*, questioning the rule of law and protection of the minorities in India. The inadequacy of the courts naturally warrants an impartial international legal intervention to redress the sacred site dispute at Ayodhya.

### 3.5. Conclusions

The case study and the in depth analysis of the Ayodhya dispute brings out the following conclusions. Certainly, the conclusions derived from the case study would serve as a useful framework for checking and settling similar sacred site disputes, both in India and in other parts of the world.

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<sup>329</sup> ‘Liberhan Commission’s Term Extended by Six Months’ *Outlook*  
<[http://www.outlookindia.com/pti\\_news.asp?id=395479](http://www.outlookindia.com/pti_news.asp?id=395479)> accessed 25 October 2006.

<sup>330</sup> *Nalla Thambi v Union of India* AIR 1985 SC 1133.

<sup>331</sup> *State of Maharashtra v Champalal* AIR 1981 SC 1675.

### **3.5.1. Failure to provide a speedy resolution to sacred site disputes can result in exacerbation of communal conflict and denial of human rights.**

Had the Ayodhya dispute been settled in 1950, much of the violence and human rights violations would have been averted. The delay by the courts to adjudicate the title suits for forty two years has led to the demolition of the mosque. The post-demolition period, particularly between 6 and 13 December 1992, witnessed outrageous communal riots, which according to the official records has claimed 1,200 lives.<sup>332</sup> However, unofficially the number should have been much higher. By 7 December 1992, communal riots had spread all over UP and Delhi and to the states of Madhya Pradesh, Rajasthan, Gujarat, Maharashtra, Andhra Pradesh, Karnataka, Punjab, Bihar, Kerala, West Bengal and Assam.

Communal riots were very common in India. Most telling was the one that immediately followed the Partition. It is no exaggeration to say that communal hatred has divided the nation ever since the Babri Masjid-Ram Janmabhumi dispute came to the fore, at least from 1985. M.M. Jacob, then Minister of State for Home, informed the Upper House of Parliament that in 1989 and 1990, a total of 2025 people fell victim to communal frenzy in sixty-two major riots in the country. That the Minister attributed the communal killings to the heightening of tension following the Babri Masjid-Ram Janmabhumi controversy<sup>333</sup> is a vital point to be underlined.

The civil suits for title filed in 1950 in the Ayodhya dispute were transferred to the High Court in 1989. They still remain at a trial phase. No matter what the High Court decision is with regard to the title suits, its verdict is bound to be appealed to the Supreme Court by the losing party. So, it may be seen how the adjudication process could be prolonged for many more years. Until then the dispute will be alive, which will continue to threaten communal harmony. A biased judiciary that remains passive, or delays, will definitely deny justice (as was demonstrated in the civil cases in the Ayodhya dispute), and will infringe on fundamental rights, and may continue to exacerbate communal conflicts. Domestic case law generally remains the formal record and basis for appraisal of application of

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<sup>332</sup> C Jaffrelot, *The Hindu Nationalist Movement and Politics 1925 to the 1990s* (Hurst & Co, London 1996) 458-64.

<sup>333</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 249.

international human rights standards in a state.<sup>334</sup> The Ayodhya case study has highlighted the failure of Indian courts in applying these standards domestically.

### **3.5.2. Legal rights granted to a religious community are insufficient if the state organs are unwilling to use their power to enforce them.**

The Indian Constitution grants unambiguous legal rights to religious communities. Articles 25-30 of the Constitution delineate the rights of religious communities and minority communities. Moreover, Sections 295-298 of IPC ensure protection of sacred sites from defilement, desecration and destruction. Besides, the 1991 Protection of Places of Worship Act extends the protection to all sacred sites in case of dispute. Even though these legal rights are available to secure the rights of religious communities, failure of the state organs in enforcing them makes the sacred sites vulnerable to attacks and destruction.

There was only one order from the courts in the Ayodhya dispute, this being to maintain the 'status quo', and even this was not fully executed by the state organs. In addition, the UP state government also defied the orders of the union government to remain neutral in the dispute and to increase the security around the Babri Masjid. This establishes the communal bias of the state government.<sup>335</sup>

On 6 December 1992, the day of the demolition of the mosque, the Supreme Court itself observed that a grave situation had emerged. It is a matter of concern that a constitutionally elected government could not discharge sensitive duties in a matter of this magnitude.<sup>336</sup> However, the union government had a duty, as directed by the Supreme Court, to act in a proper and permissible way to protect the Babri Masjid.<sup>337</sup> The subsequent demolition of the mosque and failure to prevent the building of the makeshift temple by the *Sangh Parivar* showed the inefficiency of the union government to enforce its power. The statement of V.P. Singh, the former Prime Minister of India, that 'the fall of the three

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<sup>334</sup> M Siraj Sait, 'Forced Labour in South Asia: An Anatomy of Judicial Interventions' in M Anderson and M Happold (eds), *Constitutional Human Rights in the Commonwealth* (The British Institute of International and Comparative Law, London 2003) 63.

<sup>335</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1994) 72-9.

<sup>336</sup> Legal Correspondent 'UP Government did not discharge its duties' *The Hindu* (New Delhi 7 December 1992).

<sup>337</sup> The Supreme Court order in IA no 5 in Contempt Petition no 97/92 dated on 25 November 1992.

domes of the Babri Masjid were in fact the collapse of the three pillars - Legislature, Judiciary and Executive - of Indian democracy'<sup>338</sup> summarises that legal rights granted to a religious community are rendered insufficient if the state organs are unwilling to use their power to enforce them.

### **3.5.3. Religiously based dispute over a sacred site can be used to mobilise community identities for political gains.**

It is obvious from the Ayodhya dispute how communal forces could use a religious dispute as a cloak to gain political power, which has been amply demonstrated in the rise to power of the BJP in national politics. In pursuance of power, these communal forces have no regard for secular values, democratic principles or human rights.<sup>339</sup> Mobilisation for gaining political power seems to be one and only agenda.

Contemporary political identity of the Hindu and Muslim communities is built along religious lines. Communal violence resulting from the Ayodhya dispute proved to be a turning point in Indian politics which has led to each community having deeply entrenched, polarised political views. The tragedy of the Ayodhya dispute is that it has eroded the belief of communities in the federalist, secular principles enshrined in the Constitution. Also, the political confrontation encourages religious-cultural confrontation and that in turn strengthens the former.<sup>340</sup> The case study establishes the fact that the use of a sacred site dispute helped to politicise communal identities, which in turn helped to strengthen the political muscle of the communal forces.<sup>341</sup>

Since sacred sites are tied up with the identity of particular communities, any attack on them is seen as an attack on the community and will naturally be defended vigorously. This was demonstrated in the ensuing violence that took place all over India after the demolition.

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<sup>338</sup> MJ Akhtar, *Babri Masjid: A Tale Untold* (Genuine, New Delhi 1997) 202.

<sup>339</sup> Aijaz Ahmad, 'Somnath to Gandhinagar: A Night of Long Knives' in KN Panikkar and S Muralidharan (eds), *Communalism, Civil Society and the State: Reflections on a Decade of Turbulence* (SAHMAT, New Delhi 2002) 27-9.

<sup>340</sup> AA Engineer (ed), *Communalism and communal Violence in India: An Analytical Approach to Hindu-Muslim Conflict* (Ajanta, New Delhi 1989) 94-5.

<sup>341</sup> For example, BJP which had two Parliamentary seats in 1984, increased to one hundred and twenty in 1991. It is due to its successful mobilisation of Hindus in the Ayodhya dispute. In another seven years, BJP formed the Union Government. Its election manifesto shows that its major aims include building a 'magnificent Ram Temple'. <<http://www.bjp.org/>> accessed 10 March 2006.

Religious disputes have an influence beyond the boundary of a particular country and may threaten the peace of a whole region.<sup>342</sup>

#### **3.5.4. Undermining of the established secular values leads to the erosion of the minority rights.**

From the case study on the Ayodhya dispute, it has been established that the courts continued to support the majoritarian religious community by allowing the Hindus to worship in the disputed site while excluding the Muslims. Obviously, this was an assault on the principles of secularism and equality. Throughout the dispute, the judiciary seems to have neglected the principles of secularism and protection of minority rights.

Minority communities still view secularism as a guarantee to their fundamental right. Secularism enshrined in the Constitution is seen as the linchpin that binds together all the diverse groups of people within India. Tied up with secularism is the principle of equality. Individuals and all religious communities have equal rights, and the state should not discriminate among its citizens on the basis of their religion. So, equality along with secularism, are essential to protect the rights of minorities, the cornerstones of democracy.

As secularism is basic to the Constitution, any attack on a sacred place could be construed as an attack on secularism as established by the Supreme Court in the *Bommai* case.<sup>343</sup> Similar opinion was expressed by Justice Sawant as, 'the concept of secularism as religious tolerance and equal treatment of all religious groups includes an assurance of the protection of life, property, and places of worship for all religious groups'.<sup>344</sup> This may establish that if a state subverts a fundamental constitutional principle such as secularism, it is impossible for it to run its administration in accordance with the provisions of the Constitution. Consequently, as Justice Ramaswamy points out, 'social disunity is bound to corrupt leading to national disintegration.'<sup>345</sup>

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<sup>342</sup> Post-Babri Masjid demolition saw Hindu temples being demolished in Pakistan, Bangladesh and in various Arab countries. M Mahmood, 'Backlash to the Destruction at Ayodhya: A View from Pakistan' (1993) 33 *Asian Survey* 711-21.

<sup>343</sup> *SR Bommai v Union of India* (1994) 3 SCC 1.

<sup>344</sup> *Ibid* 149.

<sup>345</sup> *Ibid* 208.

The State and the judiciary are equally guilty of undermining the principles of secularism and protection of minority rights, and could be held culpable for all the inter-communal strife which has taken place during the last two decades. The union and state governments, by their actions and non-actions, have brought down the mosque, observes Brass.<sup>346</sup> Hence they need to take responsibility to protect secular values, and rights of minority religious communities.

### 3.6. Concluding Observations

As a concluding observation of the case study, it is relevant to point out that there were individuals, groups and movements who tried to express alternative viewpoints to bring about a peaceful settlement to the Ayodhya dispute. When their views and initiatives were looked down on with contempt by the communal forces, many broad-minded Hindus rallied behind these secular groups. Though their peace marches were physically stopped by the state machinery and many were taken into custody before and after the demolition of the mosque,<sup>347</sup> they still continue to engender public opinion to gather strength for building up a civil society. Had they the support of the domestic legal institutions and international legal mechanisms then and now, the dispute would have been settled amicably and glaring human rights violations would have been avoided. So, even if a particular state fails to solve such a sensitive dispute, an impartial international legal body could still intervene to provide speedy remedy to prevent inter-communal violence and concomitant violation of human rights. Hence, the ensuing chapter looks into the existing international legal instruments for settling such sacred site disputes.

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<sup>346</sup> PR Brass, 'Secularism Out of Its Place' in Veena Das and others (eds) *Tradition, Pluralism and Identity: In Honour of TN Madan* (Sage, New Delhi 1999) 363.

<sup>347</sup> K Prasad and others, *Report: Citizen's Tribunal on Ayodhya* (The Secretariat, New Delhi 1994) 19. Multi-party peace march led by VP Singh, former Prime Minister, from Lucknow to Ayodhya was arrested before reaching Ayodhya on 5 December 1992.



## CHAPTER 4

### PROTECTION OF SACRED SITES IN INTERNATIONAL LAW

#### 4.1. Introduction

The failure of the Indian judiciary and state in protecting the sacred site at Ayodhya has been established in the previous chapter. The destruction of the sacred site not only endangered the human rights of the minority Muslim community but also provoked regional tensions which had international repercussions. Reports of the various national and international human rights organisations highlighted the fact that the destruction of this sacred site in India is nothing but failure to protect the right to freedom of religion of the Muslim community.

There have been similar incidents in other countries reported by the Special Rapporteur. To cite a few as examples, in Nigeria, the authorities warned the Christian community that one hundred and fifty buildings used as places of worship could not be used for that purpose.<sup>1</sup> In Myanmar, Christians in various districts were ordered to stop conducting worship in their churches.<sup>2</sup> Tajikistan destroyed three non-approved mosques in the Frunze district.<sup>3</sup> Religious militants have destroyed several churches and mosques in Indonesia.<sup>4</sup> In Mexico, numerous Protestant churches were destroyed by rural leaders.<sup>5</sup> A Baptist church in Moldova was demolished, allegedly because it had been built illegally.<sup>6</sup> Also in Iraq, religious buildings have been at risk of selective destruction.<sup>7</sup> In Kyrgyzstan, 1,300

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<sup>1</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2000) UN Doc E/CN.4/2000/65 20 [73] (Nigeria).

<sup>2</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2002) UN Doc A/57/274 9 [40] (Myanmar).

<sup>3</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2003) UN Doc A/58/296 16 [92] (Tajikistan).

<sup>4</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2000) UN Doc E/CN.4/2000/65 [49] (Indonesia). In Indonesia, several churches and mosques were destroyed due to the activities of religious extremists.

<sup>5</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2000) UN Doc E/CN.4/2000/65 [66] (Chiapas, Mexico).

<sup>6</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2002) UN Doc A/57/274 [50] (Moldova).

<sup>7</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1993) UN Doc E/CN.4/1993/62 [39]; (2005) UN Doc E/CN.4/2005/61/Add.1 [144-47] (Iraq).

mosques came under the risk of closure when they were subjected to registration procedures in 2001.<sup>8</sup> This illustrates that state and non-state actors can limit the right to freedom of religion through restrictive practices relating to the establishment, maintenance, access and protection of sacred sites, which affects free exercise of right to freedom of religion.

Another significant reason for the need to develop international human rights law arises out of the failure of the domestic judiciary in sacred sites disputes such as the Ayodhya dispute. The International Human Rights treaties guarantee that ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations’.<sup>9</sup> As provided for in the UDHR and the relevant main international instruments, it is the judiciary that ensures that ‘everyone has the right to an effective remedy... for acts violating the fundamental rights granted him by the Constitution or by law’.<sup>10</sup> First imperative is the independence of the judicial bodies to meet the requirements of competence, impartiality and legality so that everyone can effectively exercise their right.

Recently the UN Commission on Human Rights<sup>11</sup> re-examined this question and appointed a Special Rapporteur on the independent impartiality of the judiciary<sup>12</sup> following a study already carried out by its sub-commission on this subject.<sup>13</sup> The report of the Special Rapporteur indicates a few extreme situations where a case was not heard or examined or

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<sup>8</sup> Ibid.

<sup>9</sup> Universal Declaration on Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10 and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(1).

<sup>10</sup> UDHR (n 9) art 8; ICCPR (n 9) art 2; ECHR European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 at 1 (1969) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V /II.23 Doc 21 Rev 6 (1979) (ACHR) art 25 and African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 ILM 58 (African Charter) art 7.

<sup>11</sup> UNGA Res 60/251 (3 April 2006) has abolished Commission on Human Rights and replaced by the Human Rights Council.

<sup>12</sup> UNCHR Res 41 (1994) UN Doc E/CN.4/Res/1994/41.

<sup>13</sup> UNCHR ‘Report of the Special Rapporteur on the Question of the Independence of Judges and Lawyers’ (1999) UN Doc E/CN.4/1999/60.

the court acted under external pressure and instructions, or the legal system had been largely destroyed in conflicts and confrontation. These are related, for example, to lack of human and physical resources, inadequate training for lawyers, the malfunctioning or breakdown of systems, the technical complexity of cases, unsuitable procedures and violations of the confidentiality of the examination under media pressure. A similar situation prevailed in the Ayodhya dispute.

This chapter examines the extent to which international human rights law<sup>14</sup> provides protection to sacred sites as part of the human right to freedom of religion without any unjust interference from state and non-State actors. The first section analyses how international human rights law and its mechanisms for enforcement have developed and defined the right to freedom of religion to include protection of sacred sites. Section two examines the right of religious minority groups to manifest their freedom of religion, with a focus on whether such right incorporates protection of their sacred sites. Given that such sites tend to have naturally defined territories, it is important to consider how property rights under international human rights law facilitate the protection of sacred sites owned by the religious communities, and this will be the focus of the third section. Section four explores whether the protection given to significant sacred sites as part of cultural rights during times of war is sufficient and also whether such protection can be extended to protect such sites outside of situations of armed conflict.

#### **4.2. The right to freedom of religion and protection of sacred sites**

The right to freedom of religion is recognized and guaranteed in many regional as well as in key international human rights treaties as a human right.<sup>15</sup> As found in the existing provisions of international human rights law, the right to religion positively includes the

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<sup>14</sup> International Human Rights Law offers a supervisory framework for the protection of human rights for States to protect, fulfil, and promote human rights obligations within their domestic jurisdiction.

<sup>15</sup> UDHR (n 9) art 18; ICCPR (n 9) art 18(3); UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief UNGA Res 36/55 Doc A/36/51 art 1; ECHR (n 10) art 9; Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension (5 June – 29 July 1990) art 9(4); American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) art 3; ACHR (n 10) art 12; and African Charter (n 10) art 8.

right to manifest one's faith in 'worship alone or in community'. In many religions, including the two central to the Ayodhya dispute, worship is conducted in a definite place which is considered sacred to the adherents of the particular religion. Sacred sites remain the perceptible manifestation of religion, and as such they play a pivotal role in the life of a religious community. Often sacred sites come under attack, and disputes over them, such as the one in the Ayodhya dispute, result in egregious human rights violations. Therefore, it is paramount that sacred sites are given sufficient protection from attacks by the State and non-State actors as a key component of freedom of religion.

Three major international human rights instruments set out the rights related to freedom of religion or belief.<sup>16</sup> They are the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration on Religious Intolerance). This section argues that the provisions in these instruments relating to the right to freedom of religion are too broad, they do not cover protection of sacred sites and with the exception of the ICCPR, are mostly soft law.

#### **4.2.1. Universal Declaration of Human Rights**

In 1941, in his message to Congress, the US President, FD Roosevelt, spoke about 'the four freedoms'<sup>17</sup> which included 'freedom of every person to worship God in his own way and everywhere in the world'.<sup>18</sup> It is a fact that these four freedoms played a vital role in shaping the future Charter of the UN<sup>19</sup> which among its goals included 'promoting and encouraging respect for human rights and for fundamental freedoms for all, without

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<sup>16</sup> N Lerner, 'Religion and International Human Rights' in L Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 44.

<sup>17</sup> MG Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1996) 9 HRQ 21-2. Roosevelt stated that 'We look forward to a world founded upon four essential human freedoms including the freedom of every person to worship God in his own way - everywhere in the world.'

<sup>18</sup> MR Ishay, *The Human rights Reader* (Routledge, New York 1997) 403-7.

<sup>19</sup> United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (UN Charter).

distinction as to race, sex, language, or religion'.<sup>20</sup> It should be noted that the 'establishment' of any particular religion, globally, is not emphasised.

The UDHR, 'the conscience of the world',<sup>21</sup> sets out in a comprehensive manner most of the civil, political, economic, social and cultural rights amongst which freedom of religion is also included. The Preamble and Articles 1, 2, 16, 26 in UDHR incorporate clauses concerning freedom of religion or belief.<sup>22</sup> However, the UDHR specifically delineates the right to freedom of religion or belief in article 18 which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest religion or belief in teaching, practice, worship, and observance.

The UDHR does not define the terms 'thought', 'conscience', and 'religion'.<sup>23</sup> This has led to ambiguity in interpreting this freedom. Partsch observes that 'together these terms cover all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance'.<sup>24</sup> Regarding the inviolable nature of this freedom of religion, Scheinin cogently argues that 'the absolute character of the freedom of an inner state of mind was stressed in the drafting of the UDHR'.<sup>25</sup> Henkin concludes that 'the UDHR provides an essential support for religions'.<sup>26</sup>

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<sup>20</sup> UN Charter (n 19) art 1(3).

<sup>21</sup> U Haksar, *Minority Protection and the International Bill of Rights* (Allied Publishers, Bombay 1974) 36.

<sup>22</sup> UNCHR (Sub-Commission), 'Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswamy' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1, 12.

<sup>23</sup> M Scheinin, 'Article 18' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A common Standard of Achievement* (Martinus Nijhoff, The Hague 1999) 380.

<sup>24</sup> KJ Partsch, 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed), *The International Bill of Rights, The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 213.

<sup>25</sup> M Scheinin, 'Article 18' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A common Standard of Achievement* (Martinus Nijhoff, The Hague 1999) 382. This view was well supported by the French representative to the Third Committee of the General Assembly, Cassin, when he stated that 'the sacred and inviolable character of the right to freedom of thought, conscience, and religion, was the basis and origin of all other rights and had a metaphysical significance'. See, UN Doc E/CN.4/SR.60.

<sup>26</sup> L Henkin, 'Religion, Religions, and Human Rights' (1998) 26 *Journal of Religious Ethics* 229, 234.

The text of Article 18 consists of two parts. The first part lays out everyone's right to freedom of thought, conscience, and religion and the second part provides a two-pronged definition of that right. The first prong, the *forum internum*, contains the clause 'freedom to have and change his religion or belief'. The second prong, the *forum externum*, includes the clause 'freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'.

As seen above, Article 18 of the UDHR has acknowledged the right to worship 'either alone or in community'. However, sacred sites, which are a key component of freedom of religion and essential to conduct worship in many religions, are not explicitly covered under Article 18. One reason for this omission could be the failure to recognise collective rights since the general trend existing in the UN at that time was to give more importance to individual rights. However, Lerner argues that the reference 'to manifest a religion or belief alone or in community with others' in Article 18 makes a mild concession to group rights'.<sup>27</sup>

Any Declaration from the UN General Assembly is only a 'soft law', and it does not present binding obligations for the member states. However, the widespread acceptance of the UDHR shows that many of its provisions have achieved the status of international customary law.<sup>28</sup> For instance, from the repeated invocation of the UDHR by many states, regional inter-governmental organisations and the UN itself, using various Resolutions and Declarations as evidence, supports this argument.<sup>29</sup> This finds an assertion in Hurst Hannum's words that 'The Universal Declaration of Human Rights has been the foundation of much of the post-1945 codification of human rights, and ... today exerts a moral, political, and legal influence far beyond the hopes of many of its drafters'.<sup>30</sup> However, the

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<sup>27</sup> N Lerner, 'Religion and International Human Rights' in L Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 45.

<sup>28</sup> MG Johnson and J Symonides, *The Universal Declaration of Human Rights: A History of its Creation and Implementation 1948-1998* (UNESCO, Paris 1998) 67.

<sup>29</sup> JP Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry Translational, New York 1984) 75-6

<sup>30</sup> H Hannum, 'The Status of the Universal Declaration of Human Rights in national and International Law' (1995-6) 2 Georgia Journal of International and Comparative Law 287, 289; M Robinson 'The Universal Declaration of Human Rights: The International Keystone of Human Dignity' in Barend van der Heijden and

rights set out in the UDHR have been legally entrenched in a subsequent binding human rights treaty, the ICCPR.

#### 4.2.2. ICCPR and the Human Rights Committee

After adopting the UDHR, the UN General Assembly requested the Commission on Human Rights, through the ECOSOC, to continue to give priority in its work to the preparation of a draft covenant on human rights and draft measures of its implementation.<sup>31</sup> Subsequently, two covenants, the ICESCR and the ICCPR, together with the Optional Protocol of the ICCPR, were adopted by the General Assembly on 16 December 1966<sup>32</sup> and came into force in 1976. The ICCPR is a legally binding human rights treaty. All member states have a tripartite obligation to respect, protect and fulfil this right with respect to all individuals within their territory and subject to their jurisdiction.<sup>33</sup> The supervisory treaty body for the ICCPR is the Human Rights Committee (HRC) which was established on 20 September 1976.<sup>34</sup>

Article 18 of the ICCPR defines the right to freedom of religion in four paragraphs, which include specific limitation clauses. However, Article 18 of the ICCPR includes two other rights 'right to freedom of thought and conscience' together with 'freedom of religion'.<sup>35</sup> Article 18(1) of the ICCPR protects the individual and collective manifestations of a religion, placing particular emphasis on four forms: worship, observance, practice and teaching. However, it does not apparently contain a right to establish, maintain and protect

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Bahia Tahzip-Lie (eds), *Reflections on the Universal Declaration on Human Rights: A Fiftieth Anniversary Anthology* (Martinus Nijhoff, The Hague 1998) 254.

<sup>31</sup> UNGA Res 217 E (III) (10 December 1948) UN Doc A/810.

<sup>32</sup> UNGA Res 2200/A (XXI) (16 December 1966).

<sup>33</sup> ICCPR (n 9) art 2(3)(a)(b) and (c). This aspect is stressed by the Human Rights Committee in *Herrera Rubio v Columbia*, (Communication No 161/1983) UN Doc Supp No 40 (A/43/40) 190 (1988). The HRC held 'there is a preventive or positive aspect to the right to life'.

<sup>34</sup> Human Rights Committee is established in accordance with Articles 28-30 of the ICCPR. The HRC is an autonomous treaty-based body and the duty assigned to it is to monitor the States parties' implementation of the ICCPR and optional protocols in their domestic jurisdiction. <<http://www.ohchr.org/english/bodies/hrc/>> accessed 16 May 2006.

<sup>35</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 320. The 'right to freedom of thought and conscience' means the right of everyone to develop autonomously thoughts and a conscience free from impermissible external influence. This right to spiritual and moral existence is closely associated with the right to privacy in Article 17 of the ICCPR as well as freedom of opinion in Article 19 (1) in the same Covenant.

sacred sites as an essential part of the freedom of religion. Article 18 of the ICCPR guarantees freedom of religion to everyone in member states.

Article 18(1) of the ICCPR has two parts which is a reiteration in slightly different language of the concepts signified in Article 18 of the UDHR. Similar to UDHR, the first part guarantees everyone's right to freedom of thought, conscience, and religion and the second part provides a two-pronged definition of that right. The first prong, the *forum internum*, contains the clause 'freedom to have or adopt a religion or belief of his choice'. The second prong, the *forum externum*, includes the clause 'freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'. Unlike the freedom mentioned in the second prong, the freedom in the first prong is unconditional in the sense that it may not be restricted or be derogated from in any situation, not even in time of public emergency.<sup>36</sup> This follows from the 'derogation' clause in Article 4(2) of ICCPR and as a result, part of Article 18 belongs to the realm of 'non-derogable' rights.<sup>37</sup>

If freedom to have a religion is considered as 'passive freedom', then freedom to 'manifest' the right or to live one's life in accordance with it is an 'active freedom' of the right to freedom of religion.<sup>38</sup> Active exercise of this right is usually performed in the outside world and thus it is basically subject to limitations.<sup>39</sup> Article 18, paragraph 3 of the ICCPR, contains a limitation clause which refers only to limitations to be placed on freedom<sup>40</sup> to manifest one's religion or belief. These limitations may be used by the states to restrict the freedom of religion, particularly access and protection to sacred sites, by alleging the protection of public safety or/and public order as established in the Ayodhya dispute.

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<sup>36</sup> BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 88.

<sup>37</sup> UNCHR 'General Comment 22' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.7.

<sup>38</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 318.

<sup>39</sup> KJ Partsch, 'Freedom of Conscience and Expression, and Political Freedom' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 212-3.

<sup>40</sup> ICCPR (n 9) art 18(3): Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. It is also delineated in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights in UN Doc E/CN.4/1984/4 pt I.



The Human Right Committee (HRC) is the treaty-based body which monitors states in fulfilling their obligations based on the provisions guaranteed in the ICCPR and its Protocols.<sup>41</sup> There are three substantive procedures given for the effective observance of the rights in ICCPR. They are, firstly, under Article 40 of the ICCPR, a mandatory reporting procedure by states on the measures they have adopted to give effect to the rights provided in ICCPR and on the progress made in the enjoyment of those rights.<sup>42</sup> Secondly, under Articles 41 and 42 of ICCPR, there is an optional inter-state complaint procedure<sup>43</sup> whereby a state issues a complaint when another state party is not fulfilling its obligation under the Covenant. Finally, there is an optional individual communications procedure under the First Optional Protocol to the Covenant<sup>44</sup> whereby the HRC is able to receive and consider communications from individuals subject to the jurisdiction of a State party to the First Protocol of ICCPR.<sup>45</sup>

The role of the HRC, as a human rights mechanism, is important in protecting and promoting human rights. With regard to the protection of the right to freedom of religion, however, its success is limited. After a detailed examination, Taylor argues that 'out of the substantive Articles 1 to 27, issues under Article 18 are relatively low in the priority of most members compared to Articles which have general importance (for instance, Articles 1-10)'.<sup>46</sup> One of the reasons attributed to this limited success could be that the guidelines offered by the HRC are not sufficient for states to prepare their reports on specific aspects of each article.<sup>47</sup> This may lead to inappropriate reporting to the HRC in cases where

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<sup>41</sup> ICCPR (n 9) art 28-45.

<sup>42</sup> Ibid art 40(1).

<sup>43</sup> Ibid art 41(1); S Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 HRQ 249.

<sup>44</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI) 21 UN Doc A/6316 (1966) 999 UNTS 302 (Optional Protocol 1) art 1.

<sup>45</sup> D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon, Oxford 1994) 50-1.

<sup>46</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 12.

<sup>47</sup> I Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee* (Hart, Oxford 1999) 83.

religious freedom is under threat, and especially where many attacks on sacred sites have happened, for example, in India.

HRC admits individual communications.<sup>48</sup> Crawford notes that the 'views' of the HRC on individual communications are not binding upon the parties.<sup>49</sup> In addition, HRC does not have any authority to attach sanctions to its decisions. At most, HRC may request a respondent state 'to avoid irreparable damage to the victim'.<sup>50</sup> Besides, because HRC does not admit communications from any groups, it may deter religious communities from making complaints. Also, as a treaty-based body, the HRC places its reliance upon state reports which more often than not do not contain any information on attacks on sacred sites.

The gap in Article 18 of ICCPR relating to sacred sites was addressed, though not fully, through General Comment No. 22 which was adopted in the HRC on 20 July 1993.<sup>51</sup> In paragraph 4 of the General Comment 22, HRC states:

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulas and objects, the display of symbols and the observance of holidays and days of rest.

While examining the freedom of religion ensured under Article 18 of the ICCPR, Para 4 of the General Comment 22 may be viewed as a development in furtherance of religious freedom since it has acknowledged the 'right to build places of worship'. However, if freedom to maintain and protect places of worship could have been added, that would have strengthened the right to manifest in worship one's faith or belief and, it could have necessitated the states to be more accountable in protecting sacred sites. Moreover, there are some more rights related to freedom of religion that have not been covered, such as,

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<sup>48</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI) 21 UN Doc A/6316 (1966) 999 UNTS 302 (Optional Protocol 1) art 1.

<sup>49</sup> J Crawford, 'The UN Human Rights Treaty System: A System in Crisis' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP, Cambridge 2000) 2.

<sup>50</sup> ICCPR (n 9) art 39(2) provides that the Committee shall establish its own Rules of Procedure. Rule 86 of the Rules of Procedure provides authority to the Committee before forwarding its views on the communication to the relevant State Party to inform that State 'of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation'.

<sup>51</sup> UNCHR 'General Comment 22' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.7.

freedom to make pilgrimage to the sacred sites whether inside or outside one's country, and equal protection to all cemeteries and burial places.<sup>52</sup> These shortcomings in the ICCPR necessitated creating a separate human rights instrument to protect the rights of freedom of religion or belief which was adopted in 1981.

#### **4.2.3. 1981 UN Declaration on Religious Intolerance**

A major development in codifying religious rights at international level is the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 (1981 Declaration on Religious Intolerance) which contains much more unambiguous language, bearing upon the need to protect sacred sites as religious properties. In view of the fact that the freedoms of religion or belief are such sensitive issues, the 1981 Declaration on Religious Intolerance may be rightly considered as an important human rights instrument. As Sullivan remarks, 'against the historical backdrop of all conflicts fuelled by religion, the Declaration stands as a milestone in the progressive development of human rights norms'.<sup>53</sup>

The 1981 Declaration on Religious Intolerance justifies a brief overview to understand why the adoption took a long time and why a binding Convention could not be achieved despite the fact that religious disputes and religious militancy threaten the peace and safety of the world.<sup>54</sup> A proposal was suggested in 1952 in the fifth session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities<sup>55</sup> (the Sub-Commission) to conduct a world-wide study of discrimination in the field of religious rights and practices.<sup>56</sup> To prepare a preliminary report on the proposed study, the Sub-Commission appointed Halpern from the United States. Halpern submitted his report to the Sub-

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<sup>52</sup> BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 322.

<sup>53</sup> DJ Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1998) 82 Am J Int'l L 487, 488.

<sup>54</sup> For a detailed study, see, BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 122-65.

<sup>55</sup> At present, known as the Sub-Commission on the Promotion and Protection of Human Rights.

<sup>56</sup> UN Doc E/CN.4/Sub.2/SR.104 (1952) 6.

Commission<sup>57</sup> and the report insisted there was a need of further study of violations of religious freedom.<sup>58</sup>

Based on the examination of this report, the Sub-Commission appointed one of its members from India, Krishnaswamy, as its Special Rapporteur to pursue the study<sup>59</sup> and he submitted his report to the Sub-Commission at its twelfth session in 1960. The report contained three parts and sixteen rules. The second part referred to 'freedom to manifest religion or belief' in which Rules 3, 4 and 6 are important for the purpose of this research because they emphasise the reasons for the protection of sacred sites.<sup>60</sup> The report delineated the need to protect sacred sites in unambiguous terms.

The study remains an important step in the efforts of the UN to counteract discrimination based on religion or belief and it had a substantial impact on the text and the outlook of the 1981 Declaration on Religious Intolerance.<sup>61</sup> The Krishnaswamy study was adopted, with a few modifications,<sup>62</sup> in the Sub-Commission and transmitted to the Commission on Human Rights (CHR)<sup>63</sup>. Based on this study, in 1962, the ECOSOC was requested by the General Assembly, through a resolution,<sup>64</sup> to ask the CHR, which is a subsidiary body of the

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<sup>57</sup> UNCHR (Sub-Commission), 'Preliminary Report of the Proposed Study on Discrimination in the Matter of Religious Rights and Practices' (1954) UN Doc E/CN.4/Sub.2/162.

<sup>58</sup> Ibid [8]. Halpern observes 'A study upon this subject by an international body would be particularly appropriate because religious affiliations run across national lines and violations of religious freedom in one country arouse resentment and antagonism on the part of the co-religionists of the oppressed persons in other countries'.

<sup>59</sup> UN Doc E/CN.4/Sub.2/1956/177 [119].

<sup>60</sup> UNCHR (Sub-Commission), 'Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswamy' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1. In this study, Part II - Freedom to Manifest Religion or Belief sets out some Basic Rules. *Rule 3* states: Everyone should be free to worship in accordance with the prescriptions of his religion or belief, either alone or in community with others, and in public or in private; Equal protection should be accorded to all forms of worship, places of worship, and objects necessary for the performance of rites. *Rule 4*: The possibility for pilgrims to journey to sacred places such as acts of devotion prescribed by their religion or belief, whether inside or outside their own country, should be assured. *Rule 6 (2)*: Equal protection against desecration should be afforded to all places for burial, cremation or other methods of disposal of dead, as well as to religious and other symbols displayed in these places; and equal protection against interference by outsiders should be afforded to funeral or commemorative rites of all religions and beliefs.

<sup>61</sup> Theo van Boven, 'Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs' (1991) 13 HRQ 437-49.

<sup>62</sup> UN Doc E/CN.4/800; E/CN.4/Sub.2/206 (1960) [51]-[160].

<sup>63</sup> GA Res 60/251 (3 April 2006) has abolished Commission on Human Rights and replaced by the Human Rights Council.

<sup>64</sup> GA Res 1780 (XVII) (7 December 1962).

ECOSOC, to prepare a draft declaration and a draft convention on the elimination of all forms of religious intolerance and to develop the right to religious freedom.

When a text of the draft convention came before the Third Committee of the General Assembly in 1967,<sup>65</sup> it received very strong criticism from many countries<sup>66</sup> and the General Assembly decided to postpone the draft convention and to give priority to the completion of the draft declaration.<sup>67</sup> In 1974, the CHR set up an informal working group<sup>68</sup> and after a lengthy process in 1981 it presented a draft declaration to the CHR.<sup>69</sup> The CHR adopted the draft declaration on 10 March 1981<sup>70</sup> and forwarded it to the ECOSOC which adopted it without much debate.<sup>71</sup> On 25 November 1981, the General Assembly adopted the declaration on freedom of religion without voting.<sup>72</sup> The length of the process in adopting the 1981 Declaration on Religious Intolerance indicates the sensitivity and complexity of the issue of freedom of religion or belief.<sup>73</sup>

In the 1981 Declaration on Religious Intolerance, the important article for the purpose of this research is Article VI which includes the right to worship and assemble, as well as 'to establish and maintain places for these purposes'.<sup>74</sup> Liskofsky defines article VI as the 'most significant in the Declaration'.<sup>75</sup> The 1981 Declaration on Religious Intolerance makes a significant contribution by listing nine specific illustrations of freedom encompassed in the second prong, the *forum externum*, of the overall right to freedom of

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<sup>65</sup> UN Doc A/C.3/SR.1486-SR.1514 (1967).

<sup>66</sup> Critics include Soviet Union, other communist states, several African and Asian states; Islamic states, the Catholic Church and some religious groups opposed the text of the draft convention since the definition of 'religion or belief' included theistic, non-theistic and atheistic beliefs. BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 152.

<sup>67</sup> N Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff, The Hague 1991) 92.

<sup>68</sup> UN Doc E/5464, E/CN.4/1154 (1974) [56].

<sup>69</sup> UN Doc E/1981/25, E/CN.4/1475 (1981).

<sup>70</sup> UNCHR Res 20 (XXXVII) 10 March 1981.

<sup>71</sup> ECOSOC 'Project of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' Res 1981/36 (8 May 1981).

<sup>72</sup> Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res 36/55 (25 November 1981) UN Doc A/Res/36/55 (1981 Declaration on Religious Intolerance).

<sup>73</sup> HA Jack, *How the UN Religious Declaration was Unanimously Adopted* (World Conference on Religion and Peace, New York 1982) 1

<sup>74</sup> 1981 Declaration on Religious Intolerance (n 72) art VI (a).

<sup>75</sup> S Liskofsky, *Eliminating Intolerance and Discrimination Based on Religion or Belief: The UN Role. Reports on the Foreign Scene, No.8* (American Jewish Committee, New York 1968) 468.

thought, conscience, and religion. This provision offers adherents of a religion or belief an international legal basis to comply with what is prescribed, required, or authorised by their religion or belief.<sup>76</sup>

Article VI of the 1981 Declaration on Religious Tolerance sets out the list of manifestations of religion or belief which is not an exhaustive one.<sup>77</sup> Among the nine illustrated freedoms in Article VI, freedom to worship or assemble in connection with a religion or belief, and ‘to establish, and maintain places for these purposes’, is the first one.<sup>78</sup> Article VI(c) is intended to cover the contents of religious buildings, asserting the right ‘to make, to acquire and to use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief’.<sup>79</sup> In addition, the Declaration provides for a right to teach religion ‘in places suitable for these purposes’, which reinforces the right to preserve such sites.<sup>80</sup>

One of the limitations of the 1981 Declaration is that it recognises the rights of religious communities ‘to establish and maintain places to worship or assemble in connection with a religion or belief’<sup>81</sup> but has failed to include the protection of places of worship. Although it can be argued that the words ‘to maintain places of worship’ incorporates the idea of protection of sacred sites, there is a possible threat that states may give such a narrow definition of this clause that protection is denied in times of dispute. To avoid such a narrow reading of this provision, more unambiguous coverage is needed to protect sacred sites. For instance, the following freedoms could have been included in the Declaration. They are, protection of places of worship especially during times of dispute; to undertake

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<sup>76</sup> BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 180.

<sup>77</sup> N Lerner, ‘Toward a Draft Declaration against Religious Intolerance and Discrimination’ (1981) 11 *Israel YB Hum Rts* 82, 94. Lerner points out that ‘the drafters of the Declaration felt that it was necessary to spell out some of the many concrete manifestations of the right to freedom of religion or belief, and it would not be sufficient to do so in general, abstract terms’.

<sup>78</sup> 1981 Declaration on Religious Intolerance (n 72) art VI(a).

<sup>79</sup> *Ibid* art VI(c).

<sup>80</sup> *Ibid* art VI(e).

<sup>81</sup> *Ibid* art VI(c).

pilgrimage to sacred sites whether inside or outside the country; and<sup>82</sup> protection of burial grounds and cemeteries from desecration.

Another limitation would be that the 1981 Declaration on Religious Intolerance is a soft law, and as such has not developed into customary law status such as the UDHR. Hence, states are not bound to observe its provisions. The rights set out in the Declaration are not incorporated in a subsequent binding human rights instrument.

Regarding the benefits of this Declaration, it has elaborated some rights and freedoms, general principles, and values previously approved by the member states. Furthermore, it has provided a basis for a programme of measures and action within the UN, and various governmental and non-governmental organizations.<sup>83</sup> It also provides a useful framework for the investigation of different manifestations of religion or belief.

#### **4.2.4. Charter-based bodies**

This sub-section examines the role of the Commission on Human Rights<sup>84</sup> (CHR) and the Sub-Commission on the Promotion and Protection of Human Rights<sup>85</sup> (the Sub-Commission) in protecting and promoting the right to freedom of religion. These two human rights mechanisms provide a framework through which communications can be received from states, individuals and non-governmental organisations about violations of human rights, including the right to freedom of religion. The CHR was established under Article 68 of the UN Charter, by the ECOSOC, in 1946 as an important UN organ in the field of human rights. It had subordinate status as one of several specialized commissions

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<sup>82</sup> UNCHR (Sub-Commission), 'Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswamy' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1, Rule 4.

<sup>83</sup> UNCHR (Sub-Commission) 'Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief by Benito Elizabeth Odis' in (1986) UN Doc E/CN.4Sub.2/1987/26 [203].

<sup>84</sup> UNGA Res 60/251 (3 April 2006) has abolished Commission on Human Rights and replaced by the Human Rights Council. However, this section examines the activities of the Commission on Human Rights hence its name is used instead of the Human Rights Council.

<sup>85</sup> Until 1999 the Sub-Commission on the Promotion and Protection of Human Rights was known as the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

answerable to the ECOSOC, and, through it, to the General Assembly.<sup>86</sup> Subsequently, the CHR established its subsidiary organ, the Sub-Commission, in 1947 with a special purpose to conduct studies related to discrimination of minorities in various fields. Consequently it became a permanent advisory body for the CHR and established six subsidiary working groups including a working group on minorities, and also Special Rapporteurs, to monitor human rights situations.

In 1967, ECOSOC passed Resolution 1235 (XLII) which authorized the CHR and its Sub-Commission 'to examine information relevant to gross violations of human rights and fundamental freedoms'. As part of its remit, Resolution 1235 (XLII) requested the CHR 'to examine information ... contained in the communications<sup>87</sup> listed by the Secretary-General through Resolution 728 F... to make a thorough study of situations which reveal a consistent pattern of violations of human rights'.<sup>88</sup>

The main weakness of the Resolution 1235 was that procedures adopted in dealing with communications were not confidential and were of a public nature. Also it did not permit individuals and non-governmental organisations (NGOs) to send communications. Furthermore, with regard to the implementation of the recommendations, the CHR was dependent upon the cooperation of states and governments, whose mandates are limited to reporting to the CHR. As a result, Resolution 1235 did not have the desired effect, although it was true that the victims were provided with an opportunity to voice their grievances.<sup>89</sup> So, the Sub-Commission recommended that the CHR develop a confidential procedure to consider information from a variety of sources and, accordingly, Resolution 1503 (XLVIII)

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<sup>86</sup> P Alston, 'The Commission on Human Rights' in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford 1992) 126.

<sup>87</sup> Communications based on ECOSOC Res 728 F (XXVIII). UN receives numerous communications from individuals or groups of persons whose human rights have been violated. See, Theo van Boven, 'The United Nations Commission on Human Rights and Violations of Human Rights and Fundamental Freedoms' in F Coomans and others (eds), *Human Rights from Exclusion to Inclusion: Principles and Practice* (Kluwer Law International, The Hague 2000).

<sup>88</sup> ECOSOC Res 1235 (XLII) (6 June 1967).

<sup>89</sup> United Nations, *Seventeen Frequently Asked Questions about United Nations Special Rapporteurs: Fact Sheet No: 27* (United Nations, Geneva 2001) 12-3.



was adopted on 27 May 1970.<sup>90</sup> Under this Resolution, individuals and NGOs were allowed to submit communications.<sup>91</sup> All actions under Resolution 1503 'shall remain confidential until such time as the CHR may decide to make recommendations to ECOSOC'.<sup>92</sup> However, it should be noted that the communication must be that it reveals a consistent pattern of gross violations of human rights.

With regard to the Charter-based bodies, two main reasons underline the inadequacy of the CHR and the Sub-Commission in protecting sacred sites from attacks, as violation of human rights. Firstly, the Resolution 1(XXIV)<sup>93</sup> which is related to the question of admissibility of communications<sup>94</sup> received by the Secretary General under and in accordance with ECOSOC Resolution 1235,<sup>95</sup> states that 'the communication must contain ... the rights that have been violated'<sup>96</sup>. As noted by Rehman 'to establish the pattern of violations, reliance should be placed on violations of the rights as provided in the UDHR or other major human rights treaties'.<sup>97</sup> It is crucial, since protection of sacred sites as a key component of freedom of religion does not appear specifically in any of the international human rights instruments such as UDHR, ICCPR or the 1981 Declaration, and Charter-based bodies remain inadequate in providing any remedy for sacred sites disputes. Secondly, as these bodies have only recognised individual rights, and not collective rights of religious groups, the CHR could not offer effective remedy in protecting sacred sites, which fall under the collective rights of a religious community.

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<sup>90</sup> ECOSOC Res 1503 (XLVIII) (27 May 1970). Resolution 1503 could be rightly declared as a 'petition-information' system because the objective is to use complaints as a means by which to assist the CHR in identifying situations involving a 'consistent pattern of gross and reliably attested violations'.

<sup>91</sup> ECOSOC Res 2000/3 (16 June 2000) [7](a) and (c). Once the CHR receives those communications, it considers particular situations in two separate closed meetings. At the first closed meeting, each country concerned would be invited to make opening presentations and a discussion would follow subsequently between members of the CHR and the government concerned. At the second meeting, members of the CHR would discuss and take action on the draft resolutions or decisions and the Chairperson of the CHR should announce in a public meeting which countries had been examined under the 1503 procedure.

<sup>92</sup> ECOSOC Res 1503 (XLVIII) (27 May 1970) [8].

<sup>93</sup> UNCHR (Sub-Commission) Res 1 (XXIV) (13 August 1971).

<sup>94</sup> ECOSOC Res 728 F (XXVIII) (30 July 1959).

<sup>95</sup> I Brownlie and GS Goodwin-Gill (eds), *Basic Documents on Human Rights* (5<sup>th</sup> edn OUP, Oxford 2006) 18.

<sup>96</sup> UNCHR (Sub-Commission) Res 1 (XXIV) (3) (a) (13 August 1971).

<sup>97</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 44.

The CHR appointed its first Special Rapporteur on Freedom of Religion or Belief<sup>98</sup> (the Special Rapporteur) in 1986 with a special task ‘to examine incidents and governmental actions inconsistent with the provisions of the 1981 Declaration on Religious Intolerance and to recommend remedial measures for such situations’.<sup>99</sup> An appraisal of the role of the Special Rapporteur in protecting and promoting the right to freedom of religion is vital since his/her reports to the CHR highlight the human rights violations based on religion, particularly attacks on sacred sites.

The reports of the Special Rapporteur are based mainly on the 1981 Declaration on Religious Intolerance and General Comment No. 22 issued by the HRC on Article 18 of the ICCPR. Although there are many reports by the Special Rapporteurs concerning attacks on freedom of religion including sacred sites, the HRC hasnot received many reports from states which mentioned such attacks.<sup>100</sup> The work of the Special Rapporteur remains valuable in supplementing some of the deficiencies of ICCPR reporting system.<sup>101</sup>

Most of the reports of the Special Rapporteurs express grave concern at attacks upon religious places, sites and shrines and call upon all states to recognize, as provided in the 1981 Declaration on Religious Intolerance, the right of all persons to worship or assemble in connection with a religion or belief, and to establish and maintain places for those purposes. These reports also call upon all states, in accordance with their national legislation, to increase efforts to ensure that religious places and shrines are fully respected and protected.<sup>102</sup>

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<sup>98</sup> The Special Rapporteur on Religious Intolerance is now known as Special Rapporteur on freedom of religion or belief.

<sup>99</sup> UNCHR Res 1986/20, UN Doc E/CN.4/1986/65 (1986). The Special Rapporteurs are: Angelo d’Almeida Ribeiro (Portugal) 1986-93; Abdelfattah Amor (Tunisia) 1993-2004; and Asma Jahangir (Pakistan) 2004-.

<sup>100</sup> BG Tahzip, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 269.

<sup>101</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 15.

<sup>102</sup> UNGA Res 48/128 (20 December 1993) UN Doc A/Res/48/128 para 6-7; UNGA Res 49/188 (23 December 1994) UN Doc A/RES/49/188; UNGA Res 50/183 (6 March 1996) UN Doc A/RES/50/183; UNGA Res 51/93 (28 February 1997) UN Doc A/RES/51/93; UNGA Res 52/122 (12 December 1997) UN Doc A/RES/52/122; UNGA Res 53/140 (1 March 1999) UN Doc A/RES/53/140; UNGA Res 54/149 (22 February 2000) UN Doc A/RES/54/159; UNGA Res 56/157 (11 December 2001) UN Doc A/RES/56/157; UNCHR Res 23 (1995) UN Doc E/CN.4/RES/1995/23; UNCHR Res 23 (1996) UN Doc

From the reports, it may be noted that violations of freedom of religion display certain characteristics. Policies, practices and acts that impair the freedom to dispose of religious property; in the form of non-restitution of confiscated religious property; refusal of access to places of worship (obstacles to, and even banning of, construction or rental); restrictions on the number of followers; attacks against and closure and destruction of places of worship, cemeteries and denominational schools, and confiscation of religious property (including religious works).<sup>103</sup> The reports highlight the restrictions on certain religious groups including access to places of worship (Israel) which may also lead to the closing of those sacred sites (Bulgaria, China, Lao People's Democratic Republic). Bureaucratic obstacles to the acquisition of property by certain religious communities have also been reported in Indonesia and Romania. Moreover, places of worship become the target of very serious violations, especially arson (Indonesia), desecration (Yemen) and destruction (China).<sup>104</sup>

The Special Rapporteurs emphasised that places of worship should be reserved for religious rather than political purposes and protected from political tensions and conflicts. This can only be assured if states adopt and implement appropriate legislation, provide for the neutrality of places of worship and protect them from the vagaries of politics and ideological and partisan commitments.<sup>105</sup> The misuse of sacred sites for political purposes is well established by the Ayodhya dispute.<sup>106</sup> Furthermore, a report on India details that violence against minorities, notably in the states of Gujarat, UP, Bihar, Orissa, Punjab and Maharashtra, is reportedly continuing in the form of attacks on places of worship, property, churchgoers and clergy.<sup>107</sup>

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E/CN.4/RES/1996/23; UNCHR Res 18 (1998) UN Doc E/CN.4/RES/1998/18; UNCHR Res 39 (1999) UN Doc E/CN.4/RES/1999/39; UNCHR Res 82 (1999) UN Doc E/CN.4/RES/1999/82.

<sup>103</sup> UNCHR 'Conclusions and recommendations of the Special Rapporteur on all forms of intolerance and of discrimination based on religion or belief' (1999) UN Doc E/CN.4/1999/58.

<sup>104</sup> UNCHR 'Interim report of the Special Rapporteur on the elimination of all forms of religious intolerance' (1996) UN Doc A/51/542 [36].

<sup>105</sup> UNGA 'Note by the Secretary-General on the Implementation of the Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief' 50/440 (1995) UN Doc A/50/440 [78].

<sup>106</sup> UNCHR Res 91 (1997) UN Doc E/CN.4/1997/91/Add.1 [93].

<sup>107</sup> UNGA 'Report by the Special Rapporteur on the elimination of all forms of intolerance and of discrimination based on religion or belief' (23 September 1999) 54<sup>th</sup> Session (1999) UN Doc A/54/386 [22].

From 1988 until 2006, most of the reports submitted by the Special Rapporteurs on Freedom of Religion or Belief to the CHR and UN General Assembly speak volumes about the alleged violations of freedom of religion and particularly, attack on sacred sites. These reports highlight that the Rapporteurs have only limited powers and so they only can carry out their fact-finding investigations with the support of the governments. But they may not be able to provide any protection to sacred sites or victims of sacred sites disputes. Moreover, these reports cover the role of the state in limiting right to freedom of religion but do not include the role played by non-state actors. This is an important aspect of freedom of religion since in many occasions attacks on sacred sites are made by non-state actors or other groups as illustrated in the Ayodhya dispute.

#### **4.2.5. Regional human rights treaties and protection of sacred sites**

The right to freedom of religion is also protected under regional human rights treaties. The European, Inter-American and the African regional organisations in their respective regional Convention on Human Rights have granted right to freedom of religion. If protection of sacred sites is covered by these provisions as part of freedom of religion it is also looked in to.

##### **4.2.5.1. European convention on human rights**

Among the various human rights treaties generated by the Council of Europe, the significant one is the European Convention on Human Rights (ECHR).<sup>108</sup> Article 9 of the ECHR provides for freedom of thought, conscience and religion.<sup>109</sup> Section II of the ECHR details the establishment of the European Court of Human Rights and its procedures. The Court held through its jurisprudence that freedom of religion is a substantive fundamental human right<sup>110</sup> and further delineated this right.<sup>111</sup> For example, the Court reiterated on

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<sup>108</sup> ECHR (n 10). It has been, so far, amended through twelve protocols.

<sup>109</sup> ECHR (n 10) art 9: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

<sup>110</sup> *X and Church of Scientology v Sweden* (App 7805/77) (1979) 16 DR 68.

several occasions that ‘as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention.’<sup>112</sup> The right to manifest freedom of religion is also upheld in a number of decisions.<sup>113</sup> In addition, the Court requested states to prevent discriminatory practices against some religions.<sup>114</sup>

*Manoussakis and Others v Greece*<sup>115</sup> is one of the important cases with regard to protection of sacred sites. In this case, the applicants were prosecuted and convicted for having operated a place of worship without first obtaining the authorizations required by law. The ECHR observed,

[the] impugned conviction had such a direct effect on the applicants’ freedom of religion that it cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society. The right to freedom of religion guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.

In another case,<sup>116</sup> the Court stated that a church or ecclesiastical body may exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention. The Court declared that the Government’s refusal to recognise the applicant church, upheld by the Supreme Court of Justice’s decision of 9 December 1997, constituted interference with the right of the applicant church and the other applicants to freedom of religion, as guaranteed by Article 9 of the ECHR.

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<sup>111</sup> *Kokkinakis v Greece* (App no 14307/88) (1993) Series A no 260-A; 17 EHRR 397 [31]; *Manoussakis and others v Greece* (App no 18748/91) (1997) 23 EHRR 387 [44]; and *Metropolitan Church of Bessarabia and others v Moldova* (App no 45701/99) (2002) 35 EHRR 306 [116-119].

<sup>112</sup> *Agga v Greece* (App no 50776/99, 52912/99) ECHR 7 October 2002; *Buscarini and others v San Marino* (App no 24645/94) (2000) 30(2) EHRR 208.

<sup>113</sup> *Hasan and Chaush v Bulgaria* (App no 30985/96) (2002) 34(6) EHRR 1339; *Kalac v Turkey* (App no 220704/92) (1999) 27 EHRR 552, 558; *Kokkinakis v Greece* (App no 14307/88) (1993) Series A no 260-A; *Kontinnen v Finland* (App no 24949/94) (1996) 87 DR 68; *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 306.

<sup>114</sup> *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 306; *Canea Catholic Church v Greece* (App no 25528/94) (1999) 27 EHRR 521; *Holy Monasteries v Greece* (App no 13092/87, 13984/88) (1995) Series A no 301.

<sup>115</sup> *Manoussakis and others v Greece* (App no 18748/91) (1997) 23 EHRR 387 [47].

<sup>116</sup> *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 306 [101].

When deciding on the collective right of a religious community, the Court observed in *Agga v. Greece*, ‘while religious freedom is primarily a matter of individual conscience, it also includes, inter alia, freedom, in community with others and in public, to manifest one’s religion in worship and teaching’.<sup>117</sup> In the same manner, in *Cyprus v Turkey*,<sup>118</sup> the Court observed the restrictions placed on the freedom of movement of the Greek-Cypriot population considerably curtailed their ability to observe their religious beliefs, in particular their access to places of worship outside their villages and their participation in other aspects of religious life.

An important decision in protecting sacred sites came from the Human Rights Chamber for Bosnia and Herzegovina<sup>119</sup> in *The Islamic Community in Bosnia and Herzegovina v the Republika Srpska*<sup>120</sup> case. In this case, the Chamber considered the inadequate facilities encountered by the Muslims in the *Banja Luka* region following the destruction of mosques and desecration of graveyards during and after the conflict in 1993 and a subsequent ban on the reconstruction of those destroyed mosques. The Chamber decided that the ban on the rebuilding of the mosques was a violation of Article 9 of the ECHR. With regard to this, Taylor observes that ‘the Court emphasised far more rigorously than the European institutions themselves ever have, the positive obligation on states to protect these rights and freedoms by effective, reasonable, and appropriate measures’.<sup>121</sup> This assertion by the Chamber could be deemed as an improvement in establishing a right to protect sacred sites.

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<sup>117</sup> *Agga v Greece* (App no 50776/99, 52912/99) ECHR 7 October 2002 [52, 53].

<sup>118</sup> *Cyprus v. Turkey* (App no 25781/94) (2002) 35 EHRR 731 [246].

<sup>119</sup> The Human Rights Chamber is a judicial body established under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement). Now it is known as Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina. <<http://www.hrc.ba/>> accessed 10 January 2007.

<sup>120</sup> *The Islamic Community in Bosnia and Herzegovina v the Republika Srpska* (Case no CH/96/29) Decided on 11 June 1999 (2000) 7(3) IHRR 833.

<sup>121</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 244.

#### 4.2.5.2. Inter-American Convention

Article 12 of the American Convention on Human Rights (ACHR) guarantees the freedom of conscience and religion.<sup>122</sup> This includes rights such as ‘to maintain, to profess or disseminate one’s religion or belief’<sup>123</sup> but does not include the words worship and sacred sites. Several sacred sites disputes involving indigenous people have taken place within this region,<sup>124</sup> but neither the Inter-American Human Rights Commission nor the Inter-American Human Rights Court has decided any of such sacred sites disputes in favour of the indigenous people. Two important cases related to sacred sites,<sup>125</sup> decided by the Commission and the Court, were based on property rights rather than on the recognition of a right to protect sacred sites as part of freedom of religion. The US Congress passed the American Indian Religious Freedom Act 1978 (AIRFA)<sup>126</sup> to address the needs of Native American religious communities. However, the AIRFA has not been useful in protecting the sacred sites of indigenous people.<sup>127</sup>

#### 4.2.5.3. African Charter

Article 8 of the African Charter on Human and People’s Rights (ACHPR)<sup>128</sup> grants the right to freedom of religion.<sup>129</sup> However, this right to freedom of religion does not manifestly contain a provision to protect sacred sites. The region is known for religious

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<sup>122</sup> ACHR (n 10) art 12: Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

<sup>123</sup> Ibid art 12(1).

<sup>124</sup> PW Edge, *Religion and Law: An Introduction* (Ashgate, Aldershot 2006) 129. Edge brings out the nature of the sacred sites of indigenous people as these sites are not bounded and the religious community is not in the traditional relationship with to the land of an owner.

<sup>125</sup> *Mayagna (Sumo) Indigenous Community of Awas Tingni v Nicaragua* 31 August 2001 Inter-Am Ct HR (Ser C) no 79 (2001); and *Maya Indigenous Communities of the Toledo District, Belize Case* Case no 12.053 Report no 40/04, Inter-Am CHR (2004) OEA/Ser.L/V/II.122 Doc 5 Rev 1.

<sup>126</sup> American Indian Religious Freedom Act 1978 (Public Law 95-341, 42 USC 1996).

<sup>127</sup> *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988).

<sup>128</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) OAU Doc CAB/LEG/67/3 rev. 5; 21 ILM 58 (African Charter). Fifty-three states have so far ratified the Charter.

<sup>129</sup> African Charter (n 10) art 8: Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms. <<http://www1.umn.edu/humanrts/instrree/z1afchar.htm>> accessed 13 January 2007.

persecutions based on religious differences.<sup>130</sup> The African Commission<sup>131</sup> held in a communication against *Zaire*<sup>132</sup> that the harassment of Jehovah's Witnesses through arbitrary arrests and appropriation of church property constituted a violation of Article 8.

The regional organisations have further developed freedom of religion in their respective conventions on human rights which have binding obligations on member states. The conventions have established regional human rights enforcement mechanisms such as the regional human rights commissions and regional human rights courts which have further defined the right to freedom of religion through various case-law (apart from Africa which has recently established a regional human rights court but it is not yet operational). However, the provisions in the conventions guarantee freedom of religion and its manifestation but none of them explicitly cover protection of sacred sites as part of the right to freedom of religion to a religious community.

#### 4.2.6. Conclusions

It may be ascertained that the international and regional human rights instruments do not offer any remedy to protect sacred sites by failing to include them as an important element of the right to freedom of religion. Given the significance that sacred sites play in the manifestation of freedom of religion in worship, protection of sacred sites deserves more attention to ensure peace and security. In the contemporary world where attacks on sacred sites have become so common, the expected follow up of a convention after the 1981 Declaration on Religious Intolerance, still remains unfulfilled.<sup>133</sup> In 1988, while submitting his second report on religious freedom, the Special Rapporteur, Ribeiro, stated:

The adoption of a Convention would give a broader and more profound dimension to existing concepts by expanding the scope of religious rights and freedoms in their practical

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<sup>130</sup> For detailed study, see, J Maxted and A Zegey, 'North Africa, West and the Horn of Africa' in Minority Rights Group (ed), *World Directory of Minorities* (Minority Rights Group, London 1997) 388-463.

<sup>131</sup> African Charter (n 10) art 30: An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

<sup>132</sup> *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire*, (Communications 25/89, 47/90, 56/91 and 100/93) Ninth Activity Report Annex VIII (1995-1996) 444.

<sup>133</sup> P Alston, 'The Commission on Human Rights' in P Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon, Oxford 1992) 134.



manifestations. Moreover, the mandatory nature of the provisions of such an instrument would impose on state parties a number of requirements, such as the submission of reports on the application of its provisions, which might encourage greater respect for religious rights and freedoms by such states.<sup>134</sup>

Inference, thus, can be made on the need to develop international human rights law to include protection of sacred sites, as further developing the right to freedom of religion. The inadequacy of existing human rights law and enforcement mechanisms emphasise the need for an exclusively binding international treaty to protect sacred sites to ensure the right to freedom of religion.

#### **4.3. Protection of sacred sites as protecting the rights of minorities**

This section argues that minority rights related to religious rights are protected mostly by soft law instruments, except the 1995 European Framework Convention, and do not deal with protection of sacred sites. As seen, the right to freedom of religion, whether for the majority or minority, is granted to everyone in Article 18 of the ICCPR. The inclusion of religious rights again in the minority rights section exhibits the vulnerability of religious minorities as a community in a pluralistic state. As with any community, religious minorities and their sacred sites have been under attack for a very long time and such attacks on them are a regular phenomenon from the state, from co-religionists, and non-state actors as highlighted for the Muslims in the Ayodhya dispute. This section focuses on the rights of religious minorities guaranteed in various international and regional human rights treaties. The analysis, thus, covers human rights treaties, such as Article 27 of the ICCPR, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992<sup>135</sup> (hereafter the 1992 Declaration), the Framework European Convention for the Protection of National Minorities 1995 and the OSCE High Commissioner on National Minorities in protecting the rights of minorities and their right to freedom of religion.

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<sup>134</sup> UNCHR 'Implementation of the Declaration of the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief by Rebeiro' 1988/45 (1988) UN Doc E/CN.4/1988/45 [55].

<sup>135</sup> UNGA Res 47/135 (18 December 1992) UN Doc A/Res/47/135.

#### 4.3.1. Definition of the term ‘minority’

Minority groups exist throughout the world. Their status can be defined, for example, by ethnic, linguistic, religious, and political groupings.<sup>136</sup> Many governments continue to refuse to recognise the rights of minorities and use forcible mechanisms of assimilation.<sup>137</sup> The phrase ‘religious minority’ applies to any group adhering to a defined set of religious beliefs.<sup>138</sup>

Various international human rights instruments, for instance, Article 27 in the ICCPR, the 1992 Declaration on Minorities and the Council of Europe’s Framework Convention for the Protection of National Minorities 1995<sup>139</sup> do not contain a definition of who is a minority.<sup>140</sup> The closest definition and often quoted in international human rights instruments comes from the Special Rapporteur, Francesco Capotorti, who defined a minority that may include a religious minority as,

A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language’.<sup>141</sup>

This definition can be applied to the Muslim community in the Ayodhya dispute where Muslims are numerically inferior to the majority Hindu community, non-dominant, religiously different to the rest of the population and committed to preserving their culture, traditions, religion and sacred sites.

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<sup>136</sup> P Thornberry, *Minorities and Human Rights law* (Minority Rights Group, London 1987) 3.

<sup>137</sup> RG Wirsing (ed), ‘Protection of Minorities: Comparative Perspective’ cited in J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 297.

<sup>138</sup> Y Dinstein, ‘Freedom of Religion and the Protection of Religious Minorities’ in DA Reidy and MNS Sellers (eds), *Universal Human Rights: Moral Order in a Divided World* (Rowman & Littlefield, New York, 2005) 147-9.

<sup>139</sup> European Framework Convention for the Protection of National Minorities (signed at Strasbourg 1.II.1995) ETS no 157 (European Framework Convention).

<<http://conventions.coe.int/Treaty/en/Treaties/Word/157.doc>> accessed 13 May 2006.

<sup>140</sup> J Packer, ‘On the Definition of Minorities’ in J Packer and K Myntti K (eds) *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi University, Turku/Åbo 1993) 24.

<sup>141</sup> UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur F Capotorti’ (1979) UN Doc E/CN.4/Sub.2/384/Rev 1; Sales no E 78XIV.1 (1991) [568].

During the establishment of the League of Nations, minority rights was discussed extensively and treaties were imposed on the new or reconfigured states of Central-East Europe<sup>142</sup> but they mostly failed to provide the desired results due to the weakness inherent in the League of Nations.<sup>143</sup> However, after the Second World War, the focus of the UN was on individual human rights. Hence a reference to minorities is not found in the UN Charter.<sup>144</sup>

#### 4.3.2. Lack of approval to group rights in international law

UDHR recognised universal human rights and with its adoption, the international community formally acknowledged its commitment to worldwide protection of human rights. Gobi Annan, former Secretary General of the UN, stated:

Human rights are foreign to no culture and intrinsic to all nations. They belong not to a chosen few, but to all people. It is this universality that endows human rights with the power to cross any border and defy any force.<sup>145</sup>

The Preamble of the UDHR says that the purpose behind the creation of international human rights law was to bind the states of the world together for the protection of individuals globally.<sup>146</sup> However, the regional human rights systems developed subsequently took account of the existing socio-cultural characteristics of each region. Now international human rights scholars are divided into two ideological camps known as universalism and cultural relativism. Universalists assert that a set of legal norms exists and should be applied to all persons. They cannot vary from state to state or individual to individual and they are to be applied equally.<sup>147</sup> Universalists claim that since rights attach

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<sup>142</sup> HJ Steiner and P Alston, *International Human Rights in Context: Law, Politics and Morals* (2<sup>nd</sup> edn OUP, Oxford 2000) 95.

<sup>143</sup> UNCHR (Sub-Commission), 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur F Capotorti' (1979) UN Doc E/CN.4/Sub.2/384/Rev 1; Sales no E 78XIV.1 (1991) [25-6].

<sup>144</sup> A Eide, 'The Non-Inclusion of Minority Rights: Resolution 217C (III)' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, The Hague 1999) 723.

<sup>145</sup> K Hastrup, 'The Quest for Universality: An Introduction' in K Hastrup (ed), *Human Rights on Common grounds: The Quest for Universality* (Kluwer Law International, The Hague 2001) 21.

<sup>146</sup> UDHR (n 9) preamble.

<sup>147</sup> L Henkin, 'Rights: Here and There' (1981) 81 Colum L Rev 1582, 1582. While defining 'human rights'. Louis Henkin observes 'to call them human suggests that they are universal: they are the due of every human being in every human society'.

to people because they are human, and not because their belonging to particular societies, there cannot be any cultural or regional variations between human rights.<sup>148</sup>

In contrast, cultural relativists emphasise that rights are defined by the particular cultural, political and social context in which one lives. For them, since there are no universally shared cultural values and norms, there are no universal rights.<sup>149</sup> Cultural relativists argue that because there are no specific trans-cultural rights or values, no state is justified in imposing its cultural ideas of right on any other state.<sup>150</sup> Often the universal view of human rights is described as a form of 'moral' or 'cultural imperialism' of western states.<sup>151</sup> Pannikar observes, 'human rights are universal from the vantage point of modern Western culture, but not universal from the outside looking in'.<sup>152</sup>

A major point of dispute arising from the debate of universalism versus cultural relativism is the question of whether the individual is the fundamental unit of society and the sole subject of international human rights law, or whether human rights are enjoyed as collective rights by groups. Human rights law presumes that the social, political and legal form of the modern nation-state has global legitimacy. Hence the focus of human rights law is preserving the rights of the individual against this state.<sup>153</sup> Jack Donnelly observes 'although ... Universal Declaration models do deny human rights to groups, they assume that individuals will exercise many rights as members of 'natural' and voluntary groups'.<sup>154</sup>

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<sup>148</sup> PD Curran, 'Universalism, Relativism, and Private Enforcement of Customary International Law' (2004) 5 Chi J Int'l L 311, 316.

<sup>149</sup> HJ Steiner and P Alston, *International Human Rights in Context: Law, Politics and Morals* (2<sup>nd</sup> edn OUP, Oxford 2000) 366-67.

<sup>150</sup> R Klein, 'Cultural Relativism, Economic Development and International Human Rights in the Asian Context' (2001) 9 Touro Int'l L Rev 1, 6-7.

<sup>151</sup> G Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 Buff Hum Rts L Rev 211, 217.

<sup>152</sup> R Pannikar, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 Diogenes 76, 94.

<sup>153</sup> Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 Australian Yearbook of International Law 1-36, 11.

<sup>154</sup> J Donnelly, *Universal Human Rights in Contemporary Theory and Practice* (2<sup>nd</sup> edn Cornell University Press, Ithaca 2003) 205.

In contrast, for many societies, collective or community rights would be preferred to individual human rights and the human group takes precedence over the individual.<sup>155</sup> Many indigenous societies now claim for the recognition of their collective or group rights. For instance, subjectivity and identity in the communal traditions of indigenous African societies rely on relational concepts.<sup>156</sup> In Asian Confucian societies, the individual has no privileged status; rather the human is understood as only one aspect of an interdependent cosmos.<sup>157</sup>

Protection of sacred sites as an important component of freedom of religion falls in the category of group rights. As such, the entitlement of religious minority communities to hold the rights recognised in the international human rights law is an important question to be addressed. Although UDHR, ICCPR and the 1992 Declaration on Protection of Minorities recognise the right of members belonging to minority communities to exercise their rights in community with the other members of their group, they do not refer to minority groups as the formal holders of rights described in those documents.<sup>158</sup>

Rights of the minorities are interrelated and dependent on the rights of the individual, such as the right to life and physical existence, the right to non-discrimination, freedom of religion, expression and culture and the right to equality.<sup>159</sup> It is an established fact that the rights of minorities have a collective dimension.<sup>160</sup> It does mean that apart from the physical existence of members of a particular minority group, minority rights include a cultural, religious, linguistic existence which is vital to the identity and distinctiveness of the group.<sup>161</sup> Moreover, freedom of religion, cultural, linguistic and political autonomy for

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<sup>155</sup> Rhoda Howard, 'Dignity, Community, and Human Rights' in Abdullahi An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania, Philadelphia 1992) 81-3.

<sup>156</sup> LA Obiora, 'Feminism, Globalization, and Culture: After Beijing' (1997) 4 *Global Legal Studies Journal* 355, 397.

<sup>157</sup> R Little and W Reed, *The Confucian Renaissance* (NSW: Federation Press, Annandale 1989) 54-5.

<sup>158</sup> F Capotorti, 'Are Minorities Entitled to Collective International Rights?' in Y Dinstein and M Tabory (eds), *The Protection of Minorities and Human Rights* (Martinus Nijhoff, Dordrecht 1992) 507.

<sup>159</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 303.

<sup>160</sup> P Thornberry, *International Law and Rights of Minorities* (Clarendon, Oxford 1991) 57.

<sup>161</sup> Ibid.

minorities may lead to self-determination and possibly independent statehood.<sup>162</sup> Most often, this becomes a major reason for the suppression of minorities by states.

Among UN treaties, in recognising rights of groups, the Convention on the Prevention and Punishment of the Crime of Genocide, (Genocide Convention)<sup>163</sup> is significant as it protects religious groups and their right to existence. Under this Genocide Convention, the following groups are protected, namely, 'national, ethnic, racial or religious'.<sup>164</sup> The Genocide Convention is important for its recognition of the right of religious groups to exist as such, while most of the human rights treaties grant rights only to individuals.

#### 4.3.3. Religious minority rights

The UDHR is keen to promote individual rights.<sup>165</sup> It covers civil, political, economic, social, and cultural rights but does not contain any specific provision of minority rights. It does refer to the principle of non-discrimination.<sup>166</sup> A separate part of the resolution in the General Assembly noted that 'it was difficult to adopt a uniform solution for this complex and delicate question of minorities, which had special aspects in each state in which it arose'.<sup>167</sup> Subsequently, the General Assembly made a request to the CHR and its Sub-Commission to prepare a detailed study of the problems of minorities to accord sufficient protection in cases of violations of their human rights. As a result, the ICCPR guarantees the important rights of minorities in Article 27 which states:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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<sup>162</sup> J Rehman, 'Autonomy and the Rights of Minorities in Europe' in S Wheatley and P Cumper (eds), *Minority Rights in the New Europe* (Kluwer Law International, The Hague 1999) 217-31.

<sup>163</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

<sup>164</sup> Genocide Convention (n 163) art II.

<sup>165</sup> A Eide, 'The Non-inclusion of minority Rights: Resolution 217C (III)' in G Alfredsson and A Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, The Hague 1999) 723.

<sup>166</sup> UDHR (n 9) art 2: Everyone is entitled to the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.

<sup>167</sup> UNGA Res 217A (III) and 217C (III) (10 December 1948).

It protects ethnic, religious and linguistic minorities that fulfil the qualities of numerical inferiority, weak position, solidarity and stability.<sup>168</sup> However, religious minorities are those groups that profess and practice a religion that differs from that of the majority of the population. Their membership is established by professing their faith, normally a voluntary act, which is protected by Article 18(2) of the ICCPR<sup>169</sup>.

Since minority rights are not easily exercised by individuals alone, the expression 'in community with the members of their group' was inserted.<sup>170</sup> Capotorti argues that this was included in order to 'maintain the idea of a group'.<sup>171</sup> Dinstein observes, 'without the collective element, the individual's rights could easily become devoid of any substance'.<sup>172</sup> In contrast to Article 18, Article 27 of the ICCPR does not underline 'individually or in community' but members of minorities are guaranteed the rights listed in Article 27 only 'in community with the other members of the group'. The reference in Article 27 to the right of minorities 'to profess and practice their own religion' illustrates the importance attached to religious minorities and implies that greater protection should be given to religious practices which include worship, either in private or public.

An important fact in Article 27 is that the state parties have an obligation not to deny persons belonging to minorities the common 'enjoyment of their cultural life', the common 'practice of their religion' and the common 'use of their language'. The difference between Article 18 and Article 27 is that, although the collective practice of religion is guaranteed to everyone in Article 18, there are restrictions (Article 18(3)) which are not found in Article 27.<sup>173</sup>

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<sup>168</sup> P Thornberry, *International Law and Rights of Minorities* (Clarendon, Oxford 1991) 158.

<sup>169</sup> ICCPR (n 9) art 18(2): No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

<sup>170</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 495.

<sup>171</sup> F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (United Nations, New York 1991) 32.

<sup>172</sup> Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 ICLQ 102, 102.

<sup>173</sup> Text to n 40, below.

The case law<sup>174</sup> and General Comment provided by the HRC on Article 27 point out the existence of a body of jurisprudence which requests the protection of minority identity and the valuing of diversity as part of the essential ‘fabric’ of communities and states. Nowak cogently argues that Article 27 provides minorities with a special right to practise their religion, publish their own literature, found cultural institutions, which represents *lex specialis*.<sup>175</sup> This is proved by the General Comment No 23 issued by the HRC that states:

Article 27 establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the ICCPR. The protection of minority rights is directed towards ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, thus enriching the fabric of society as a whole.<sup>176</sup>

The HRC has established that there are positive obligations on states to secure and strengthen the rights of minorities as fundamental rights. However, experiences in states with many peoples or with different ethnic or religious groups have shown that minority rights can often be threatened by private parties too. When these threats take on a proportion endangering the very existence of minorities, an exclusively state-directed, negative understanding (shall not be denied the right) of Article 27 would be inadequate.

The rights recognised by Article 27 are ‘conferred on the ‘persons belonging to such minorities’ and not on the ‘minority groups as such’.<sup>177</sup> This renders Article 27 meaningless

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<sup>174</sup> *Ballantyne and others v Canada* Comm no 359, 385/1989 (5 May 1993) UN Doc CCPR/C/47/D/359/1989; *Lovelace v Canada* Comm no 24/1977 (30 July 1981) UN Doc CCPR/C/13/D/24/1977; *Kitok v Sweden* Comm no 197/1985 (10 August 1988) UN Doc CCPR/C/33/D/197/1985; *Mahuika v New Zealand* Comm no 547/1993 (15 November 2000) UN Doc CCPR/C/70/D/547/1993; *Diergaardt v Namibia* Comm no 760/1997 (30 July 2004) UN Doc CCPR/Co/81/NAM.; *Chief Ominayak and the Lubikon Lake Band v Canada* Comm no 167/1984 (10 May 1990) UN Doc CCPR/C/38/D/167/1984; *Malcolm Ross v Canada* Comm no 736/1997 (26 October 2000) UN Doc CCPR/C/70/D/736/1997; *Lansman and others v Finland* Comm no 671/1995 (30 October 1996) UN Doc CCPR/C/58/D/671/1995; *CLD v France* Comm no 228/1987 (18 July 1988) UN Doc Supp no 40 (A/43/40) 1988; *Godefriens Maria Brinkhof v The Netherlands* Comm no 402/1990 (30 July 1993) UN Doc CCPR/C/48/D/402/1990; and *Jonassen and others v Norway* Comm no 942/2000 (9 February 2000) UN Doc CCPR/C/76/D/942/2000. More details, Sarah Joseph and others, *The International Covenant on Civil and political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> edn OUP, Oxford 2005) 754-93.

<sup>175</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 505.

<sup>176</sup> UNCHR ‘General Comment 23’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2004) UN Doc HRI/GEN/1/Rev.7 [1].

<sup>177</sup> Y Dinstein, ‘Freedom of Religion and the Protection of Religious Minorities’ in DA Reidy and MNS Sellers (eds), *Universal Human Rights: Moral Order in a Divided World* (Rowman & Littlefield, New York 2005) 157.



since the right ‘to profess and practice’ one’s religion is the essence of freedom of religion under Article 18(1) conferred upon every person whether or not belonging to a minority group. If Article 27 is not to be rendered meaningless, it must be interpreted to go beyond the ambit of Article 18 to include group rights. This view finds support from Starke, when he observes that ‘the purpose of Article 27 is to grant collective human rights to the members of a religious minority as a group’.<sup>178</sup>

In addition, Article 27 does not require states and governments to provide special facilities or positive obligations with respect to minorities. The only obligation of the states is not to deprive or deny the members of the minority groups the status which they enjoy already.<sup>179</sup> Likewise, compared to the demands of collective protection of minorities, the specific formulation of Article 27 seems to be inadequate.<sup>180</sup> The right guaranteed to religious minorities to ‘practice their religion’ is very broad and it does not delineate the right of religious minorities to establish, maintain and protect sacred sites. Accordingly, religious minorities, (in that case, any minority group), as collective bodies are not entitled to bring actions before the HRC either based on this article or based on Article 1 of the Optional Protocol to the ICCPR.<sup>181</sup> This renders Article 27 inadequate in protecting sacred sites belonging to religious minority communities in times of dispute.

#### **4.3.4. UN Declaration on the Rights of Minorities 1992**

The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (from 1999, UN Sub-Commission on Protection and Promotion of Human Rights) was finally able to address some of the issues of minorities in greater depth when its Special Rapporteur, Francesco Capotorti, completed his study on discrimination against minorities in 1978. Based on his proposals, The Declaration on the Rights of Persons belonging to

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<sup>178</sup> JG Starke, *Introduction to International Law* (10<sup>th</sup> edn Butterworths, London 1989) 372.

<sup>179</sup> UNCHR (Sub-Commission), ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Special Rapporteur F Capotorti’ (1979) UN Doc E/CN.4/Sub.2/384/Rev 1; Sales no E 78XIV.1 (1991) [36].

<sup>180</sup> Y Dinstein, ‘Collective Human Rights of Peoples and Minorities’ (1976) 25 ICLQ 102, 118.

<sup>181</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200A (XXI), entry into force 23 March 1976) 999 UNTS 302 (Optional Protocol).

National or Ethnic, Religious, or Linguistic Minorities (1992 Declaration) was finally completed and adopted by the General Assembly in 1992.<sup>182</sup>

The 1992 Declaration tries to overcome some of the limitations of Article 27 in the ICCPR. While Article 1(1)<sup>183</sup> encourages the promotion of minority identity, Article 2(1)<sup>184</sup> prohibits any form of discrimination. Moreover, Article 2(2) provides many participatory rights to persons belonging to minorities in 'cultural, religious, social, economic and public life'. A major right is prescribed in Article 2(4)<sup>185</sup> which authorizes minorities to establish and maintain their own associations. Article 3 underpins the collective dimension with encouragement of the communal enjoyment of rights without discrimination.<sup>186</sup> Articles 5-7 are concerned with national and international cooperation in understanding the minority question.

Although the 1992 Declaration elaborates the minority rights further and aims at achieving 'equality' by prohibiting 'discrimination', as a General Assembly Resolution its impact on the development of international law is limited.<sup>187</sup> There exists a risk that states may easily curtail the legitimate expression of minorities stating that they are 'incompatible with national legislation'.<sup>188</sup> The rights of cultural and linguistic minorities are delineated, whereas the rights of the religious minorities are not defined except for prohibiting religious discrimination. By failing to include the right to establish, maintain and protect sacred sites of religious minorities, the 1992 Declaration does not set out any new rights other than those protected in Article 27 of the ICCPR.

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<sup>182</sup> UNGA Res 47/135 (18 December 1992) UN Doc A/Res/47/135.

<sup>183</sup> 1992 Declaration (n 181) art 1(1): States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of the identity.

<sup>184</sup> Ibid art 2(1): Persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

<sup>185</sup> Ibid art 2(4): Persons belonging to minorities have the right to establish and maintain their own associations.

<sup>186</sup> Ibid art 3(1): Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group without any discrimination.

<sup>187</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow, 2003) 316.

<sup>188</sup> 1992 Declaration (n 181) art 2(3) and 4(2).

#### 4.3.5. Minority rights in Europe

Although the European Convention on Human Rights has incorporated a number of provisions on protecting the interests of minorities, only Article 14 refers directly to minorities under the non-discrimination provision.<sup>189</sup> The end of the Cold War, followed by the break up of the Soviet Union, brought the problems of minorities into prominence.<sup>190</sup> As the number of minority issues increased, the Council of Europe, in 1995 adopted the European Framework Convention for the Protection of National Minorities (European Framework Convention), which came into force in February 1998.<sup>191</sup> Exclusively focusing on minorities, it is a binding human rights instrument among the member states.

The main aim of this Framework Convention is to protect the minorities and to prohibit discrimination on the 'grounds of belonging to a national minority'.<sup>192</sup> Parties to this convention undertake an obligation 'to promote the conditions ... to maintain and develop their culture and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage'.<sup>193</sup> The parties also are obliged to take appropriate measures 'to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity'.<sup>194</sup> The right to manifest one's religion or belief is stated in Article 8: 'Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organizations and associations'.<sup>195</sup>

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<sup>189</sup> ECHR (n 10) art 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status.

<sup>190</sup> H Miall, 'Introduction' in H Miall (ed), *Minority Rights in Europe: The Scope for a Translational Regime* (Pinter, London 1994) 1.

<sup>191</sup> European Framework Convention for the Protection of National Minorities (signed at Strasbourg 1.II.1995) ETS no 157.

<sup>192</sup> Ibid art 3 and 4.

<sup>193</sup> Ibid 5(1).

<sup>194</sup> Ibid 6(2).

<sup>195</sup> Ibid art 8.

Yet the Framework Convention is limited in protecting sacred sites since the parties undertake only 'to recognise' the right mentioned above and the Article does not include the undertaking 'to protect' the religious institutions (places of worship) which often come under attack. This lack of protection of places of worship is critical in the context of Article 6(2) which only protects persons belonging to minorities and not their institutions.<sup>196</sup> Moreover, the Framework Convention gives enough flexibility for the states to hide behind the 'margin of discretion' and to implement their treaty obligation to their convenience.<sup>197</sup> State parties are required only to submit reports to an advisory committee narrating the measures taken to implement the treaty. Finally, the European Convention establishes only general principles which are not directly applicable at the domestic level.<sup>198</sup>

Failure to recognise the group rights does not grant the rights of religious minorities to establish, maintain, and especially protect their sacred sites when they come under attack. The Framework Convention reiterates this point in an explanatory note, while commenting that the application of the provisions of the convention 'does not imply the recognition of collective rights'.<sup>199</sup> At times the enjoyment of individual human rights is virtually impossible unless a collective human right is implemented, for instance, freedom of religion.<sup>200</sup>

In addition to the Framework Convention, minority issues are covered under the Organisation for Security and Cooperation in Europe (OSCE). The OSCE appointed a High Commissioner for National Minorities to address minority issues in the European region. The principal role of the High Commissioner is to respond to the further threat of minority conflicts within its region and to minority tensions which may endanger the peace and

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<sup>196</sup> Ibid art 6(2): The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

<sup>197</sup> AK Meijknecht, *Minority Protection: Standards and Reality* (TMC Asser, The Hague 2004) 186.

<sup>198</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 321.

<sup>199</sup> European Framework Convention (n 190) [13] and [22].

<sup>200</sup> Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *The International and Comparative Law Quarterly* 102, 103.

stability in the region.<sup>201</sup> Besides, it has a mandate to reduce any tensions which may occur at the earliest possible stage to prevent the escalation of the conflict.<sup>202</sup> The main key in the arsenal of the High Commissioner is the resolution of disputes through silent diplomacy.<sup>203</sup> He conducts on-site studies to gather information to give an early warning to the states. One of the main weaknesses of the High Commission system is that there is no jurisdiction for individual complaints which might be received or considered by the Commission.<sup>204</sup>

To summarise, the key human rights instruments acknowledge the right to manifest one's religious belief in community, but nowhere do they explicitly mention the protection of sacred sites as a right to minority religious communities. Despite the fact that the rights of religious minorities are ensured in Article 27 of the ICCPR, it does not delineate them to include protection of the sacred sites. The 1992 Declaration specifically addresses the rights of minorities. Yet, it does not specifically outline any rights of religious minorities, including protection of their religious institutions, except prohibiting discrimination based on religion. At the regional level,<sup>205</sup> the European Framework Convention, regardless of its recognition of the right to manifest one's religion, does not ensure that the religious institutions belonging to religious minorities are protected. Therefore, the provisions contained in key international and regional human rights treaties remain inadequate in dealing with situations similar to the Ayodhya dispute, which denied a minority community the right to manifest its faith in worship, affecting their freedom of religion.

#### 4.4. Property rights and protection of sacred sites

Sacred sites are situated in a defined space and have boundaries which mark them, amenable within the jurisdiction of law. Though essentially a religious dispute, Ayodhya,

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<sup>201</sup> CSCE, *Helsinki Document 1992: The Challenge of Change* Decisions I [23].

<sup>202</sup> CSCE, *Helsinki Document 1992: The Challenge of Change* Decisions II [3]

<[http://www.osce.org/documents/mcs/1992/07/4046\\_en.pdf](http://www.osce.org/documents/mcs/1992/07/4046_en.pdf)> accessed 16 January 2007.

<sup>203</sup> M Nowak, *Introduction to the International Human rights Regime* (Martinus Nijhoff, Boston 2003) 173.

<sup>204</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 201-2.

<sup>205</sup> The American Convention on Human Rights 1969 and the African Charter on Human and Peoples Rights 1981 guarantee rights of non-discrimination and prohibit any discrimination based on religion. ACHR (n 10) art 1 and African Charter on Human and Peoples Rights (n 10) art 2.

when it started in 1950 was fought as a title dispute between a few people belonging to two religious communities, to establish property rights over the sacred site. As property, owners may expect to protect sacred sites under property rights. Accordingly, where ownership of the site coincides with the religious community – for instance where a property is held in trust for the practice of religion – protection of property rights may carry with it protection of the interests of that community over the sacred site. This section focuses on positive international and regional human rights law concerning property rights, in protecting sacred sites owned by the religious communities.

#### 4.4.1. Global instruments

From the nineteenth century, any expropriation of alien private property was regarded as a clear basis for a claim to be made under international law by the state of the foreigner concerned.<sup>206</sup> The Permanent Court of International Justice observed in the *Chorzow Factory* case that ‘any breach of engagement involves an obligation to make reparation.’<sup>207</sup> However, the treatment of property rights was seen as an internal matter of the state.

In general, property rights allow for the acquisition and ownership of private property and they protect individuals, alone or in association with others from state encroachment.<sup>208</sup>

After the Second World War, serious attempts were made to promote the right to property to the international level. The UDHR is the only major global instrument which contains a broad criterion protecting property. The draft for the right to property led to substantial debate and finally a formulation drafted by a sub-committee, consisting of the US, UK, France and the then USSR, became the final text.<sup>209</sup> It was incorporated in the UDHR in Article 17: (1) everyone has the right to own property alone as well as in association with others; (2) no one shall be arbitrarily deprived of his property.

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<sup>206</sup> JG Starke, *Introduction to International Law* (10<sup>th</sup> edn Butterworths, London 1989) 298.

<sup>207</sup> *Chorzow Factory Case* (1928) PCIJ (Ser A) no 17 [29].

<sup>208</sup> C Krause and G Alfredsson, ‘Article 17’ in G Alfredsson and A Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, The Hague 1999) 359.

<sup>209</sup> Theo RG van Banning, *The Human Right to Property* (INTERSENTIA, Antwerpen 2002) 37-8.

The right to own property as set out in Article 17 of the UDHR prohibits the arbitrary deprivation of any property. The language of Article 17 is broad and applies to both individual and collective forms of right to property. Article 17(2) points out that property rights are not absolute and under certain circumstances this right could be withdrawn, though not arbitrarily. Though a reasonable interference is allowed by the states for lawful purposes, when such interference or appropriation amounts to 'arbitrary' is not defined in the article.

The right to property is essentially left to the protection of domestic, legal and economic apparatus. The Article does not specify what limitations can be imposed on the right to property even if the general limitations contained in Article 29 apply to Article 17. However, as a UN General Assembly Declaration, there is no binding obligation to the UDHR on states.

Many conventions and declarations have mentioned the right to property of various groups.<sup>210</sup> However, neither the ICCPR nor the ICESCR included this right in their documents. The subject was debated at length when the covenants were drafted but there was no agreement<sup>211</sup> on an acceptable text.<sup>212</sup> The significant disagreements during the debate led the CHR to finally decide not to include the right to property in the Covenants, except in relation to the right to non-discrimination.<sup>213</sup> Several complaints of the violation of property rights submitted to the HRC have been rejected in the absence of a specific article protecting property rights.<sup>214</sup>

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<sup>210</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106(XX), entered into force 4 January 1969) 660 UNTS 195 art 5; Declaration on the Elimination of Discrimination against Women (Proclaimed 7 November 1967 UNGA Resolution 2263 (XXII) art 6; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 15 and 16; 1957 ILO Convention (No 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 328 UNTS 247; 1989 ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries 72 ILO Bulletin 59 (1989).

<sup>211</sup> UNGA 'Annotations on the Text of the Draft International Covenants on Human Rights prepared by the Secretary-General' (1955) UN Doc A/2929 [65]-[67].

<sup>212</sup> N Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (CPU, Cambridge 2002) 909.

<sup>213</sup> ICCPR (n 9) art 2(1).

<sup>214</sup> Theo RG van Banning, *The Human Right to Property* (INTERSENTIA, Antwerpen 2002) 81.

#### **4.4.2. Use of sacred sites as property of religious communities are curtailed by state procedures**

States often control the freedom to worship by placing restrictions on sacred sites. Many such restrictions are highlighted by the reports of Special Rapporteurs on Freedom of Religion or Belief. A common restraint imposed by states includes the repair and maintenance of existing buildings. In Egypt, when the Coptic Church applied for renovations, there were delays of up to thirty years in granting permission for building or renovations and most of the churches were closed in the interim period.<sup>215</sup> In Malaysia, the granting of permission to construct places of worship was delayed for religions other than Islam.<sup>216</sup> Yet another method of restricting religious minorities in establishing or utilising places of worship is through registration procedures. In many states, the registration formalities are frequently used in a discriminatory way. For example, in Russia, authorities in the town of Belgorod refused registration of the Catholic community. The authorities were afraid that if the Catholic community were registered, then they would claim the repatriation of the Catholic buildings which were given to the Russian Orthodox Church by the authorities.<sup>217</sup>

Apart from these general limitations prescribed in the above mentioned human rights instruments, states impose certain restraints which curtail the free exercise of this right to freedom of religion, such as restrictions on planning permission and registration of sacred sites. This process can be used to deny adherents of a particular religion access to sacred sites and may prevent them from establishing and using a sacred site. Moreover, in many states these procedures are used to restrict the structural aspects of religious practice.<sup>218</sup>

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<sup>215</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1990) UN Doc E/CN.4/1990/46 13 [40]; (1992) UN Doc E/CN.4/1992/46 15-7 [30]; (1984) UN Doc A/39/40 57 [301] and (2002) UN Doc A/57/274 [29] (Egypt).

<sup>216</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1995) UN Doc E/CN.4/1995/91 [59] (Malaysia).

<sup>217</sup> International Helsinki Federation for Human Rights (IHF), *Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America Report 2000* (IHF, Vienna 2000).

<sup>218</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 242.



Regarding planning permission, the reports of the Special Rapporteur have highlighted the exploitation of planning permissions in several states, including Romania, where the Baptist church at Comanesti was under threat of demolition because it had been built without permission.<sup>219</sup> It is difficult for Protestant and Armenian Orthodox churches to get a permit to build places of worship in Georgia;<sup>220</sup> Vietnam denied permission to build a sacred site and subsequently destroyed;<sup>221</sup> Bhutan refused the Seventh Day Adventist Church permission to build a church;<sup>222</sup> China destroyed several Buddhist institutes on health and safety regulations;<sup>223</sup> Turkey delivered formal notices to twenty-three congregations of Turkish Christians in various cities alleging that their places of worship were in violation of municipal building laws.<sup>224</sup> In countries like Saudi Arabia, construction of churches and temples are allegedly prohibited altogether.<sup>225</sup> These examples highlight the interference of states in exercising the right to freedom of religion by religious communities.

#### 4.4.3. Regional level human rights treaties and property rights

The general human rights conventions adopted at regional levels, European, Inter-American, and African Charter, contain provisions on the right to property.<sup>226</sup> Article 1 in Protocol I to the ECHR guarantees the right to property. Jayawickrama analyses the article and points out three distinct rules which comprise the right.<sup>227</sup> The first, which is of a general nature, articulates the principle of peaceful enjoyment of property. The second

<sup>219</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1990) UN Doc E/CN.4/1990/46 [72] (Romania).

<sup>220</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2000) UN Doc E/CN.4/2000/65 [40]; (2004) UN Doc E/CN.4/2004/63/Add.1 [46] (Georgia).

<sup>221</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2000) UN Doc E/CN.4/2000/65 25 [99] (Vietnam).

<sup>222</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2001) UN Doc E/CN.4/2001/63 8 [19] (Bhutan).

<sup>223</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2003) UN Doc E/CN.4/2003/66 [21-3] (China).

<sup>224</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (2002) UN Doc A/57/274 10 [52-3] (Turkey).

<sup>225</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1990) UN Doc E/CN.4/1990/46 40 [74] (Saudi Arabia).

<sup>226</sup> Protocol I ECHR art 1, ACHR art 21 and AFCHPR art 14.

<sup>227</sup> *Marckx v Belgium* (App no 6833/74) (1979) 2 ECHR 330.

includes deprivation of possessions and prohibits it except in the public interest, and subject to 'the conditions provided by law and by the general principles of international law'. The third recognises that the state is entitled to control the use of property in accordance with the 'general interest'. When attacks on a sacred site take place, these three rights are violated.

Article 21 of the American Convention on Human Rights states that everyone has the right to the use and enjoyment of their property but these can be deprived for reasons of public utility or social interests and 'according to the forms established by law.'<sup>228</sup> Many disputes of indigenous people's rights to their sacred lands have been recorded from this region. In a few cases, the Inter-American Court on Human rights and the Inter-American Commission on Human Rights have ensured the rights of indigenous people to claim their property rights over sacred lands. For instance, In the *Mayagna*<sup>229</sup> case, the Inter-American Court on Human Rights ruled that the state of Nicaragua had violated the right to property as expressed in Article 21 of the ACHR by granting logging concessions on the traditional lands of the Mayagna (Sumo) community of Awas Tingni. Subsequently, the Court required Nicaragua to adopt measures to create an effective mechanism for official recognition, demarcation, and titling of the indigenous community's properties.

In the *Maya Indigenous Communities case*,<sup>230</sup> the Inter-American Commission on Human Rights issued a report finding that the state of Belize, by granting logging and oil concessions on lands used and occupied by the Maya people in the Toledo District, violated the property rights of the Maya people. The Commission ordered Belize to demarcate Maya lands in accordance with the Maya custom and in consultation with Maya people, to officially recognise the collective property rights and undertake measures to protect them. The decision in the *Maya case* is significant in protecting sacred sites of indigenous people.

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<sup>228</sup> ACHR (n 10) art 21(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; (3) Usury and any other form of exploitation of man by man shall be prohibited by law.

<sup>229</sup> *Mayagna (Sumo) Indigenous Community of Awas Tingni v Nicaragua* Judgment of 31 August 2001 Inter-Am Ct HR (Ser C) no 79 (2001).

<sup>230</sup> *Maya Indigenous Communities of the Toledo District v Belize* Case no 12.053 Report no 40/04, Inter-Am CHR (12 October 2004) OEA/Ser.L/V/II.122 Doc 5 Rev 1.

In the African region, Article 14 in the AFCHPR guarantees the right to property and prohibits any encroachment on the right except ‘in the interests of public need or in the general interest of the community’. However, there is little evidence to show that communications (complaints) are sent from religious groups to protect their sacred sites as property rights.

In the domestic jurisprudence of several countries, property rights enjoy wide and liberal meaning,<sup>231</sup> to include not only concrete rights of property but also abstract rights. It is established that the right to property is now recognised as a right at domestic level but they are not absolute rights. They are subject to appropriation by states for the general interest and it is necessary that the deprivation is reasonably compensated to the value of the property, which strikes a balance between the demands of the public interest and the individual’s fundamental rights.<sup>232</sup>

To recap, though UDHR recognises property rights as a human right, as a soft law, it has no binding obligations among the member states. Moreover, since property rights are not entrenched in the ICCPR or in ICESCR human rights treaties, its effectiveness in protecting sacred sites through property rights remains limited. The violation of property rights, in this case, the rights of a religious community, results in violation of the protection of the interests of the community over the sacred sites. There is a need for adopting a binding human rights treaty to protect the rights of religious communities as owners of sacred sites within a state.

#### **4.5. Protection of sacred sites as protecting cultural sites**

UNESCO defines the term culture as ‘the set of distinctive spiritual, material, intellectual and emotional features of a society or social group, encompassing, in addition to art and

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<sup>231</sup> *Inland Revenue Commissioners v Lilleyman* British Caribbean Court of Appeal Guyana (1964) 7 WIR 496.

<sup>232</sup> *Sporrong and Lonnroth v Sweden* (App no 7151/75 and 7172/75) (1982) 5 EHRR 35; *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Symonette*, Privy Council on appeal from the Supreme Court of the Bahamas (2000) 5 LRC 196.

literature, lifestyles, ways of living together, value systems, traditions and beliefs'.<sup>233</sup> Culture refers to a variety of concepts, and religious affiliation has historically been amongst the most powerful of influences.<sup>234</sup> In international humanitarian law, places of worship are included in the protection of cultural properties during armed conflicts. This section examines various international humanitarian law conventions which contain provisions related to sacred sites and their protection during war or armed conflicts.

#### 4.5.1. Hague Convention and protection of sacred sites

When different cultures come into conflict, religion becomes an easy identifier and religious monuments, such as churches, mosques and temples, become easily identifiable objects of attacks.<sup>235</sup> Most often, sacred sites come under attack because they are a reminder of the presence of 'the enemy'. Any attack on such sacred sites curtails the freedom of religion guaranteed in key international and regional human rights treaties. Hence, the issue of desecrating and destroying sacred sites may be approached not only as the removal of enemy sacred sites, but also as disrupting the right to freedom of religion expressed through worship 'alone or in community with others who share the faith.'

Destruction of cultural properties, particularly sacred sites, is not a new phenomenon in recorded history.<sup>236</sup> The first successful attempt at protecting cultural property, which includes places of worship during war, was made in the two international Peace Conferences held in 1899 and 1907 in The Hague. Article 5 of the Hague Convention IX (1907) states that in bombardments by naval forces all the necessary measures must be taken by the commander to spare, as far as possible, sacred edifices, buildings used for artistic, scientific purposes, and historical monuments.

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<sup>233</sup> UNESCO, *Report of Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention* (UNESCO Intangible Heritage Section, Paris 2006) 25. <<http://www.unesco.org/culture/ich>> accessed 17 January 2007.

<sup>234</sup> S Murden, 'Cultural Rights' in J Baylis and S Smith (eds), *The Globalisation of World Politics: An Introduction to International Relations* (3<sup>rd</sup> edn OUP, Oxford 2005) 540.

<sup>235</sup> GM Mose, 'The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property' (1996) 3 Buff J Int'l L 180, 197.

<sup>236</sup> J Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmouth, Vermont 1996) 3-4.

After the Second World War, however, it became obvious that a complete renegotiation of the principles formulated in the above mentioned Conventions was needed and this resulted in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which expands upon the norms of the 1907 Hague Conventions, but also adds several new features to the law of cultural property.<sup>237</sup>

Article 1 of the Hague Convention, 1954, defines cultural property as movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular and offers an illustrative but non-exclusive list of examples.<sup>238</sup> The same article of the 1954 Convention requires that parties undertake to prepare a defence in time of peace to safeguard cultural property in the event of an armed conflict. Significantly, most of the Convention applies to non-international as well as international conflicts. Additionally, the Convention created a register<sup>239</sup> called the 'International Register of Cultural Property under Special Protection' on which monuments of particular importance that qualify for special protection can be listed.

Article 8(1) of the 1954 Hague Convention indicates three categories of property to which special protection is to be given, namely, a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, centres containing monuments, and other immovable cultural property of very great importance. These properties can be placed under special protection if two conditions are fulfilled and respected. They include that the protected property must be situated at an adequate distance<sup>240</sup> from any large industrial centre or from any important military objective, and the protected property must

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<sup>237</sup> DA Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law' (1993) 11 B U INT'L L J 349, 352.

<sup>238</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (The Hague Convention 1954) art 1.

<sup>239</sup> The Hague Convention 1954 (n 237) art 8.

<sup>240</sup> Ibid art 8(1)a.

not be used for military purposes.<sup>241</sup> Unfortunately, 'adequate distance' has not been defined, and Stanislaw Nahlik concludes that it must be assessed on a case-by-case basis.<sup>242</sup>

The special protection arrangements have accomplished very little. To date, cultural sites in four states, (the Vatican City, 18 January 1960; Austria, 17 November 1967; Germany, 22 April 1978; and the Netherlands, 12 May 1969), have been entered in the register at the request of those states, a total number of eight refuges as well as the whole of Vatican City State.<sup>243</sup> The application by the Khmer Republic on 31 March 1972 related to the entry of monuments, including temples of Angkor and other cities, was not included due to objections by four High Contracting Parties.<sup>244</sup> Apart from this political manoeuvring, the practical difficulties, such as defining 'adequate distance', may have deterred states from registration. Many sacred sites such as Buddhist shrines, Jerusalem, Mecca and other important religious sites have not been included, showing the limitations of the register.

#### 4.5.2. Geneva Conventions IV and Protocols I and II, 1977

Another area of importance, the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, 1949 (hereafter the Geneva Convention), in particular the IV Geneva Convention, had fundamental influence in the drafting of the 1954 Hague Convention.<sup>245</sup> As such, the 1977 Protocols I, II to the IV Geneva Conventions add several important provisions relating to the protection of cultural property. Article 53 of Protocol I, 1977 states:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or *places of worship* which constitute the

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<sup>241</sup> Ibid art 8(1)b.

<sup>242</sup> SE Nahlik, 'Protection of Cultural Property' in UNESCO, *International Dimensions of Humanitarian Law* (UNESCO, Paris 1988) 207.

<sup>243</sup> UNESCO, 'International Register of Cultural Property under Special Protection' <<http://unesdoc.unesco.org/images/0014/001407/140792E.pdf>> accessed 17 November 2006.

<sup>244</sup> Four High Contracting Parties are Cuba, Egypt, Romania and Yugoslavia, which claimed that the Application for Registration was not presented by the authority entitled to represent Khmer Republic (present Cambodia). See J Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmouth, Vermont 1996) 108-9.

<sup>245</sup> Ibid 21.

cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the objects of reprisals.<sup>246</sup>

Paragraph (a) of Article 53 forbids acts of hostility directed at properties which constitute the 'cultural or spiritual heritage' of peoples. This is a very significant addition to the protection of cultural property which is entirely absent from the 1954 Hague Convention and seems to represent some evolution in the law regarding *religious cultural property*.<sup>247</sup> The significance of this addition should be noted here as it arguably extends protection to a number of sacred sites which would not be covered by the previous 1954 Hague Convention on the protection of cultural property during armed conflict.

The draft article referred specifically to places of worship, but only to cultural and not spiritual heritage.<sup>248</sup> As there was still disagreement as to whether every place of worship was part of the cultural heritage of peoples, the committee deleted reference to places of worship from Article 53 and placed it in Article 52 of Additional Protocol I, 1977 as an example of property normally committed to civilian use. At the insistence of a large number of states however, 'places of worship' was returned and supplemented with the current language on 'cultural or spiritual heritage'.<sup>249</sup> The ICRC noted that spiritual importance may exist even in the absence of cultural importance, and that 'spiritual' was written into Protocol I to cover such situations, but not to extend protection to local churches or mosques.<sup>250</sup> The Belgian delegate agreed and described this view saying that the article referred to 'places of worship so intimately associated with those faiths that, more than all the other religious buildings already protected under Article 52, they seemed to be their true embodiment on earth'.<sup>251</sup>

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<sup>246</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1977 UNYB 95; reprinted in 16 ILM 1391 (Protocol I to Geneva Conventions).

<sup>247</sup> GM Mose, 'The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property' (1996) 3 Buff J Int'l L 180, 185.

<sup>248</sup> M Bothe and others, *New Rules For Victims of Armed Conflicts: Commentary on the Two Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, The Hague 1982) 331.

<sup>249</sup> Ibid 332. A number of Muslim States, along with the Holy See and Italy, insisted on this modification.

<sup>250</sup> International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva 1987) 646.

<sup>251</sup> HS Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (Oceana, New York 1980) 221.

Protocol II also covers situations of non-international armed conflict and contains a provision on the protection of cultural property. Article 16 prohibits ‘any acts of hostility directed against historic monuments, works of art or *places of worship* which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort’.<sup>252</sup> The provisions of the two Protocols are important since they have included the ‘spiritual’ aspect of cultural property but they do not cover all protections covered by the 1954 Convention.<sup>253</sup> However, the 1980 Iran-Iraq War, when so many cultural sites came under attack by the Iraqi military, exposed the inadequacies of the 1954 Convention, prompting UNESCO to convene a meeting of legal experts to discuss the situation created by the Iran-Iraq War.<sup>254</sup> The need to have a fresh look at the 1954 Convention was further advanced by the invasion of Kuwait by Iraq in 1990, which witnessed the plunder of Kuwaiti cultural institutions. This was followed by the war in Yugoslavia in 1991 in which hundreds of mosques and churches were destroyed, especially the conflict in Bosnia-Herzegovina which demonstrated the vulnerability of sacred sites at the close of the twentieth century.<sup>255</sup>

In a subsequent UNESCO conference, it was noted that ‘the international system of safeguards of the world cultural heritage did not appear to be satisfactory, as indicated by the ever-increasing dangers due to armed conflicts’.<sup>256</sup> After various meetings and discussions lasting a decade, the Second Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted.<sup>257</sup> The ‘enhanced protection’ created in chapter 3 emerged as one of the core rationales of the Second Protocol. Unlike the ‘special protection’ in the 1954 Convention, ‘enhanced protection’ is available for immovable and movable cultural property, and conditions

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<sup>252</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 16 ILM 1447 (Protocol II to Geneva Conventions) art 16.

<sup>253</sup> GM Mose, ‘The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property’ (1996) 3 Buff J Int’l L 180, 185.

<sup>254</sup> UNESCO, Paris Meeting of Legal Experts on the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1983) UNESCO Doc CLT.83/CONF.641/1.

<sup>255</sup> GM Mose, ‘The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property’ (1996) 3 Buff J Int’l L 180, 204.

<sup>256</sup> Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP, Cambridge 2006) 237.

<sup>257</sup> The Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999 by the Hague Diplomatic Conference) (Second Hague Protocol 1999)



became more realisable since the requirement that the property in question be situated in an adequate distance from military objectives is absent in this Protocol. Moreover, Chapter 4, the Second Protocol's regime of penal sanctions embodies two war crimes specifically relating to cultural property under enhanced protection. One of the important achievements of the Second Protocol of the 1954 Convention is the establishment of a twelve-person inter-governmental Committee<sup>258</sup> for the Protection of Cultural Property in the event of Armed Conflict, which is empowered 'to establish, maintain, and promote the List of Cultural Property under Enhanced Protection.'<sup>259</sup>

After the destruction of the statues of Buddha in Bamiyan by the Taliban Government of Afghanistan in 2001, the General Conference of UNESCO adopted a resolution entitled 'Acts Constituting a Crime Against the Common Heritage of Humanity'.<sup>260</sup> Subsequently, the 'UNESCO Declaration Concerning the International Destruction of Cultural Heritage' was adopted by the General Conference of UNESCO in 2003.<sup>261</sup> These efforts by UNESCO have not ensured enough protection to sacred sites which become evident from the reports of the ongoing Iraqi War. One reason for this failure is the absence of powerful enforcement mechanisms based on the 1954 Hague Convention for the Protection of Cultural property in the Event of Armed Conflict.<sup>262</sup>

The specific protection of sacred sites, therefore, appears to be found only in international humanitarian law during times of war or armed conflicts, and moreover, these provisions are not supported by enforcement mechanisms. Indeed, outside of armed conflicts there is no apparent protection for these cultural and spiritually significant places of worship. This absence of protection within international human rights law was highlighted when the Bamiyan Buddha statues in Afghanistan<sup>263</sup> and the Babri Mosque in India were destroyed. These and many other incidents demonstrate the inadequacy of the international law to prevent the demolition of these sacred sites. If protection of sacred sites as a cultural right

<sup>258</sup> Second Hague Protocol 1999, Article 24(1).

<sup>259</sup> Second Hague Protocol 1999, Article 27(1)(b).

<sup>260</sup> UNESCO 31<sup>st</sup> Session (2001) 31 C/Res 26.

<sup>261</sup> UNESCO 32<sup>nd</sup> Session (2003) 32 C/Res 33 Annex.

<sup>262</sup> Roger O'Keefe, *The Protection of Cultural property in Armed Conflict* (CUP, Cambridge 2006) 300.

<sup>263</sup> CNN.Com/World, 'Photos document destruction of Afghan Buddhas 12 March 2001'

<<http://archives.cnn.com/2001/WORLD/asiapcf/central/03/12/afghan.buddha.02/>> accessed 12 May 2006.

had been included in the ICESCR, it would have developed the right to freedom of religion granted in Article 18 of the ICCPR. This advances the cause for framing a convention which specifically sets out the provisions for the protection of sacred sites at all times.

#### **4.6. Concluding Observations**

From the inception of the UDHR, the right to freedom of religion has been defined and developed in international human rights law. Foregoing analysis, however, has noted that the freedom of religion has to be developed and expanded to include the protection of sacred sites. Despite the recognition of the rights of religious minority groups to exercise their freedom of religion, they do not extend to cover protection of sacred sites belonging to minority communities and they are mainly soft law instruments. Though property rights are recognised as a human right, they are not entrenched in a binding human rights treaty. So, religious communities, as owners of sacred sites, may not be able to claim any protection in international law when their sacred sites are attacked and destroyed by state and non-state actors. Sacred sites, as cultural properties of humankind, are protected in international humanitarian law during armed conflicts; however, it does not seem to extend its protection outside armed conflicts.

It has now been established that international human rights law does not provide adequate protection to sacred sites. As a supervisory and supplementary level mechanism, it does provide a framework and if the gaps identified above are covered by developing new provisions of international law, it will effectively protect rights in cases of disputes over sacred sites such as the one India encountered in the Ayodhya dispute.

These findings lay the foundation for enacting further provisions of international human rights law to include the development of the right to freedom of religion. Emphasis is made here again that a convention will create binding legal obligations on those states that lack adequate constitutional or legislative protections for sacred sites. This can further be substantiated from the observation of the Special Rapporteur that 'the mandatory nature of the provisions of such an instrument (Convention) would impose on states parties a number

of requirements, such as the submission of reports on the application of its provisions, which might encourage greater respect for religious rights and freedoms by such states'.<sup>264</sup>

Moreover, in promoting and protecting human rights, regional instruments seem to have an edge over international bodies, partly due to the adjudicating power of the regional mechanisms such as commissions and regional courts. Their decisions bind states with more obligations than international instruments which are limited to monitoring the implementation of human rights in member states. Consequently, the next chapter examines the possibilities of drafting a regional human rights treaty to protect sacred sites.

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<sup>264</sup> UNCHR 'Report of Special Rapporteur Ribeiro' (1988) UN Doc E/CN.4/1988/45 [25].

## **CHAPTER V**

### **A DRAFT MODEL FOR REGIONAL CONVENTION**

#### **5.1. Introduction**

The preceding chapter established the fact that although sacred sites formed vital components to freedom of religion, their protection is not adequately covered under international human rights law. Similarly, regional human rights conventions, though they guarantee the right to worship, do not include protection of the sacred sites. Nonetheless, that protection of sacred sites has not been established as a right in any of these regional human rights treaties is no clear ground for legal protection when disputes arise over these sites. Hence, this chapter develops a draft regional human rights convention for the protection of disputed sacred sites like in Ayodhya or any other site similar to it in the South Asian region.

#### **5.2. Benefits of Regional Approach**

This section analyses the general characteristics of regional human rights organisations and their advantages over global human rights mechanisms. It will further examine the strengths and weaknesses of existing regional human rights organisations and compliance mechanisms such as the European, the inter-American and the African human rights organisations for the proposed one for the South Asian region.

##### **5.2.1. Regional human rights organizations**

In the Universal Declaration of Human Rights (UDHR),<sup>1</sup> Article 28 proclaims that everyone is entitled to a social and an international order<sup>2</sup> for which realisation of human rights, democracy, the rule of law and international cooperation are necessary. Cooperation between states is not a new phenomenon and it has, since the establishment of nation-states, become a sine-qua-non of international politics. It shows that the international order is not a

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<sup>1</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>2</sup> UDHR (n 1) art 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

stagnant pattern of interaction among states, but a continuous set of arrangements designed for establishing constant interaction within states.<sup>3</sup>

In the contemporary world, this interaction among states is better illustrated in their regional level cooperation. Verma points out that after the Second World War, the phenomenon of international cooperation operating at the regional level has increased.<sup>4</sup> Evidently, Ramcharan argues that regional and international organisations have to cooperate together in order to harmonise the work they do to promote human rights.<sup>5</sup>

While comparing the usefulness of existing regional organisations to global human rights mechanisms, the inherent weakness of the latter is quite apparent in so many ways. For instance, the international community may only take limited action to rectify the failure of any given state to file periodic reports about promoting and protecting human rights. Moreover, often it is a problem for the international community to reach agreement on the range and content of human rights to be protected, owing to the various religious and cultural difficulties.<sup>6</sup> Strengthening the enforcement mechanism may be another challenge in international law.<sup>7</sup> A significant limitation at the global level is the absence of a permanent human rights court where individuals can file petitions against states for failing to protect people from violation of human rights. Initially, the United Nations Charter<sup>8</sup> included development of regional systems aimed at securing the maintenance of peace and

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<sup>3</sup> P Lyon, 'New States and International Order' in A James (ed), *The Bases of International Order: Essays in Honour of C.A.W. Manning* (OUP, Oxford 1973) 24-5.

<sup>4</sup> SP Verma, 'South Asia As a Region: Problems and Prospects' in SP Verma and KP Misra (eds), *Foreign Policies in South Asia* (Orient Longmans, New Delhi 1969) 345.

<sup>5</sup> B Ramcharan, 'Complementarity between Universal and Regional Organisations: Perspectives from the UN High Commissioner for Human Rights' (2000) 21 *Human Rights Law Journal* 324-26. Ramcharan points out that regional and international organisations have to cooperate together in order to harmonise the work they do to promote human rights in the following areas; developing a universal culture of human rights; national capacity-building; protecting the vulnerable such as minorities, migrants, indigenous populations; the implementation of human rights; early warning and conflict prevention; emergency response; and peace making/keeping/building.

<sup>6</sup> RK Smith, *International Human Rights* (OUP, Oxford 2003) 83. For instance, it took nearly two decades for the UN to finalize and complete the ICCPR and ICESCR due to differences among member states.

<sup>7</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 355.

<sup>8</sup> United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (UN Charter).

security under Chapter VII.<sup>9</sup> However, in 1977, the General Assembly openly acknowledged the benefit of regional human rights systems.<sup>10</sup>

With regard to the advantages of regional human rights systems, it may be noted that in many regions, where the legal and social traditions are more similar, it has been easier to reach an agreement on a common standard due to its flexibility and ability to change as conditions around them change.<sup>11</sup> Since fewer states will be involved, reaching political consensus becomes easier with regard to agreeing texts and in creating any enforcement machinery. Many regions, not all, are also relatively homogeneous with respect to culture, religion, language, and tradition which have obvious advantages.<sup>12</sup> The principal regions which operate human rights systems are relatively homogeneous in so far as many of their states have broadly similar political and cultural histories.<sup>13</sup>

In addition, regional systems develop more geographic and linguistic accessibility to people. At the implementation level, familiarity among the states can produce a more successful system. The unwillingness on the part of states to bring inter-state complaints under international law is improved at the regional level.<sup>14</sup> It is also true that regional sanctions can be a very real threat.<sup>15</sup> A significant advantage of regional human rights system could be the establishment of regional courts and more detailed procedures for hearing complaints of those victims of human rights violations committed by a member state and delivering binding decisions.<sup>16</sup>

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<sup>9</sup> UN Charter (n 8) Article 52(1) states: Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

<sup>10</sup> UNGA Res 32/127 (16 December 1977) Doc A/RES/32/127.

<<http://www.un.org/documents/ga/res/32/ares32r127.pdf>> accessed 18 August 2006.

<sup>11</sup> GW Mugwanya, 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999) 10 Ind Int'l & Comp L Rev 35, 41-2.

<sup>12</sup> Inis L Claude Jr, *Swords into Plowshares: The Problems and Progress of International Organization* (3<sup>rd</sup> edn Random House, New York 1964) 95.

<sup>13</sup> BH Weston and others, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 Vand J Transnat'l L 586, 589-90.

<sup>14</sup> In 1978, Ireland became the first State to bring an inter-State complaint before a regional court for adjudication. See, *Ireland v United Kingdom* (App no 5310/71) (1978) 2 EHRR 225.

<sup>15</sup> RK Smith, *International Human Rights* (OUP, Oxford 2003) 83-90.

<sup>16</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 356-58.

One of the criticisms about regional human rights organisations emerges within the context of the debate over whether human rights as articulated in the current international legal system are universal or culturally relative. From the outset, the UN was gripped by a debate over the existence of a universal set of human rights as opposed to different sets of rights applicable to the various regional, religious and political backgrounds of the Asian and African regions.<sup>17</sup> The regional declarations which insist so much on ‘cultural relativism’ have their opponents. Adamantia Pollis criticizes those states who claim that ‘cultural relativism’ violates their own notions of rights and obligations, while their own elites use the leverages of state power and a policy of repression to enhance, consolidate, and maintain their power.<sup>18</sup> At the same time, cultural relativism has its own supporters who acknowledge the universality of human rights principle while insisting that there should be ‘optimal flexibility’<sup>19</sup> in respecting diversity. Ghai argues that this relativism is the form and not the substance.<sup>20</sup> Although, the debate continues still, the ‘universality principle’ is formally agreed with due recognition to regional particularities in the Vienna Declaration.<sup>21</sup> It declares:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>22</sup>

However, the problem of national and regional peculiarities is referred to in the declaration when it states ‘the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind’.<sup>23</sup> Although a detailed consideration of ‘cultural relativism’ is not within the scope of the present work, it must be considered that regional particularities are now acknowledged.

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<sup>17</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 5.

<sup>18</sup> A Pollis, ‘Cultural Relativism Revisited: Through a State Prism’ (1996) 18 HRQ 316, 344.

<sup>19</sup> D Duquette, ‘Universalism and Relativism in Human rights’ in E Brams (ed), *Human Rights: Universality and Diversity* (Martinus Nijhoff, the Hague 2001) 75.

<sup>20</sup> Y Ghai, ‘Human Rights Governance: the Asia debate’ (2000) 1 Asia-Pacific Journal on Human Rights and the Law 9, 52.

<sup>21</sup> The Vienna Declaration and Programme of Action on Human Rights (adopted 25 June 1993 by the UN World Conference on Human Rights) UN Doc A/CONF.157/23 (1993).

<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)> accessed 23 November 2006.

<sup>22</sup> Ibid pt 1 [5].

<sup>23</sup> Ibid pt 2 [5].

### 5.2.2. European Regional human rights organizations

For an effective promotion and protection of human rights in a region, it should flourish with democracy,<sup>24</sup> rule of law and independent judiciary which are *sine-qua-non*. The first regional human rights system, considered most effective,<sup>25</sup> began in Europe in 1949. Among various human rights enforcement mechanisms in the European region, three organisations are significant namely, the Council of Europe, The European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE).

The Council of Europe,<sup>26</sup> established in 1949, is an intergovernmental organisation which aims at strengthening democracy, human rights and the rule of law among its member states.<sup>27</sup> Initially, the membership was only confined to the European democratic states and democracy as an obligation still exists in Europe.<sup>28</sup> The Council of Europe has generated various important human rights treaties; however, the significant one is the European Convention on Human Rights (ECHR)<sup>29</sup> which has become an effective human rights treaty in the international forum. ECHR guarantees a short list of civil and political rights and the list of rights has expanded subsequently by the conclusion of additional protocols.

A salient feature of the European system is the creation of strong monitoring and enforcement mechanisms. Section II of the ECHR describes the establishment of the Commission and the Court of Human Rights to ensure the protection of human rights by the high contracting parties. In November 1998, Protocol 11<sup>30</sup> abolished the Commission and made a full-time court the primary institution, its decisions being legally binding on the

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<sup>24</sup> UNCHR 'Interdependence between Democracy and Human Rights' Res 36 (2003) UN Doc E/CN.4/RES/2003/36 [7].

<sup>25</sup> R Higgins, 'The European Convention of Human Rights' in T Meron (ed), *Human Rights in International law: Legal and Policy Issues* (Clarendon, Oxford 1984) 495.

<sup>26</sup> Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) ETS 1.

<sup>27</sup> Statute of the Council of Europe (n 26) art 3: Each member state must accept the principles of rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.

<sup>28</sup> S Wheatley, 'Democracy in International Law: A European Perspective' in R Burchill (ed), *Democracy and International law* (Ashgate, Aldershot 2006) 99.

<sup>29</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR). It has been so far amended through twelve additional protocols.

<sup>30</sup> Protocol No 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 11 May 1994, entered into force 1 November 1998) ETS 155 reprinted in 33 ILM 960 (1994) (Protocol 11).



parties.<sup>31</sup> It is the largest established human rights body in Europe and through its consistent case-law has developed a comprehensive jurisprudence on human rights. The case-law highlights the interest of the European Court in protecting democracy in the member states.<sup>32</sup> In the *Refa Partisi and Others* case, the court held that 'democracy is without doubt a fundamental feature of European public order'.<sup>33</sup>

The unprecedented formal strengths and completeness of the procedures and the impartial application of the procedures as well as their acceptance by member states, have contributed to the success of the European system<sup>34</sup> although some areas of concern still persist.<sup>35</sup> An impartial determination of applications alleging violations of human rights and redress without delay are important characteristics of an effective human rights system and the European system has paid serious attention to this.<sup>36</sup> The recognition of the individual's right to bring a complaint to the European Court against one's own state represents the ongoing development of international/regional law.<sup>37</sup> The significance of the European Court of Human Rights can be ascertained from the fact that the organs of the Organisation of American States and the Human Rights Committee have considered its jurisprudence, as have many national courts worldwide.<sup>38</sup> Rhona Smith observes that 'The ECHR has proven an effective judicial organ with a high degree of success in the implementation of decisions'.<sup>39</sup>

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<sup>31</sup> ECHR (n 29) art 42, 43, 45 and 46 as amended by Protocol 11.

<sup>32</sup> *Chassagnou and Others v France* (App no 25088/94, 28331/95, 28443/95) (2000) 29 EHRR 615 ; *Refah Partisi and Others v Turkey* (App no 41340/98, 41342/98, 41343/98, 41344/98) (2003) 37 EHRR 1; *Selim Sadak and Others v Turkey* (App no 25144/94, 26149/95 to 26154/95, 27100/95, 27100/95, 27101/95) (2003) 36 EHRR 23; *Socialist Party and Others v Turkey* (20/1997/804/1007) ECHR 1998-III 139; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (App no 29221/95, 29225/95) ECHR 2001-IX 139.

<sup>33</sup> *Refah Partisi and others v Turkey* (n 32).

<sup>34</sup> J Donnelly, *International Human Rights: A Regime Analysis* (1986) 40 Int'l Org 599, 621.

<sup>35</sup> C Tomuchat, 'Quo Vadis, Argentoratim? The Success story of the European Convention on Human Rights and a Few Dark Stains' (1992) 13 Hum Rts L J 401-06.

<sup>36</sup> GW Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational, New York 2003) 39.

<sup>37</sup> Protocol 11 to the European Convention on Human Rights (n 30) art 34: The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

<sup>38</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 374.

<sup>39</sup> RK Smith, *International Human Rights* (OUP, Oxford 2003) 86.

In post-war Europe, to find a solution to the ideological and political conflicts, and emerging security considerations necessitated the establishment of a strong military alliance to establish peace and security in the region. With this purpose in mind, the Conference on Security and Cooperation in Europe (CSCE)<sup>40</sup> was established. The origin and development of concern for human rights in the CSCE was based on the conference held in Helsinki which began in 1973 and concluded in 1975 with the adoption of the Helsinki Final Act.<sup>41</sup> The system developed by the CSCE is designed to give early warning to states or organisations to prevent conflicts and to devise methods with regard to post-conflict rehabilitation.<sup>42</sup> The main job of the experts appointed by the CSCE is to make on-site investigations in specific cases and to appoint Rapporteurs to suggest appropriate solutions to the conflicts.

The process of the implementation of human rights was developed further in the Copenhagen meeting which resulted in the Copenhagen Document in 1990.<sup>43</sup> This was then followed by the Paris Charter<sup>44</sup> for a New Europe in 1990 which brought about the creation of the posts of Secretary General and the High Commissioner for National Minorities, which was finally established in 1992.<sup>45</sup>

The OSCE and the Office for Democratic Institutions and Human Rights, the High Commissioner on Human Rights and the European Union have been steadily building up their roles in protecting human rights.<sup>46</sup> The adoption of the Charter of Fundamental Rights of the European Union in 2000 shows the high status given to human rights within the

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<sup>40</sup> Until 1995, OSCE was known as CSCE. OSCE is the largest regional security organisation with fifty-six participating States. <<http://www.osce.org/about/13113.html>> accessed 3 March 2006.

<sup>41</sup> Conference and Security and Cooperation in Europe: Final Act (Helsinki Accord) (adopted 1 August 1975) 14 ILM 1292.

<sup>42</sup> JG Merrills, *International Dispute Settlement* (4<sup>th</sup> edn CUP, Cambridge 2005) 288.

<sup>43</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (adopted 29 June 1990) reprinted (1990) 29 ILM 1305.

<sup>44</sup> CSCE Paris Charter for a New Europe (adopted 21 November 1990) reprinted (1991) 30 ILM 190.

<sup>45</sup> CSCE Helsinki Decisions (1992) 35 ILM 1385; A de Zayas, 'The International Judicial Protection of Peoples and Minorities' in C Brolmann and others (eds), *Peoples and Minorities in International law* (Martinus Nijhoff, Dordrecht 1993) 282.

<sup>46</sup> B Ramcharan, 'Complementarity between Universal and Regional Organizations: Perspectives from the United Nations High Commissioner for Human Rights' (2000) 21 Human Rights Law Journal 324-26.

European Community.<sup>47</sup> Due to the complexity of the European processes and institutions, it is structured on the basis of the widely accepted distinction between 'prevention' and 'post facto techniques' – investigation, redress and sanctions.<sup>48</sup>

Europe as a region has established more advanced human rights institutions to protect human rights. The right of individual complainants to establish their rights under the European Convention are noteworthy.<sup>49</sup> The primary responsibility for the implementation of the ECHR and judgements of the European Human Rights Court remain with the states. In general, the states have complied with their obligation under Article 53 of the convention and effected changes of legislation and practice as an element of friendly settlement before the Commission (before 1998) or the court. To sum up, the European Convention which is inspired by the liberal democratic ideals has been translated into practice by promoting and protecting human rights in the European region.<sup>50</sup>

### 5.2.3. The Inter-American Human Rights System

The Inter-American system has been helpful in the protection of human rights in the Americas. The Inter-American region was known for a long time for gross and massive violations of human rights by dictatorial regimes.<sup>51</sup> Political turmoil and human rights have often been neglected in response to serious problems of political and economic stability.<sup>52</sup> It has also played an important role in promoting democratic government in the region.<sup>53</sup> Similarly the South Asian region is also known for its political and economic instability. Therefore in proposing a South Asian Convention for the protection of sacred sites as part of protecting and promoting human rights in that region, it may be of benefit to analyze closely how the OAS has dealt with human rights issues.

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<sup>47</sup> Charter of Fundamental Rights of European Union (adopted at Nice in December 2000). <[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)> accessed 5 May 2006.

<sup>48</sup> M Tardu, 'The European Systems for the Protection of Human Rights' in J Symonides (ed), *Human Rights International Protection, Monitoring, Enforcement* (Ashgate, Burlington 2003) 138.

<sup>49</sup> AG Mower Jr, *Regional Human rights: A Comparative Study of the West European and Inter-American Systems* (Greenwood, New York 1991) 166.

<sup>50</sup> JG Merrills and AH Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights* (4<sup>th</sup> edn Manchester University Press, Manchester 2001) 326.

<sup>51</sup> GW Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational, New York 2003) 41.

<sup>52</sup> DJ Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in DJ Harris and S Livingstone, *The Inter-American System of Human Rights* (Clarendon, Oxford 1998) 2.

<sup>53</sup> Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 Am J Int L 46, 53-5.

The Inter-American human rights system functions within the framework of the Organization of American States (OAS).<sup>54</sup> It attains strength from two legal sources, namely, the Charter of the OAS and the American Convention on Human Rights of 1969 (ACHR)<sup>55</sup>. The USA is a member which has signed but not yet ratified the Convention. The ACHR guarantees civil and political rights and without detail obligates state parties to realise the rights set forth in the Charter of the OAS. However, an additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights provides the details.<sup>56</sup>

The Inter-American System for the Protection of Human Rights attempts to defend the rights of the individual and to establish effective representative democracy in the region.<sup>57</sup> This basic notion is inscribed in the Charter of the OAS,<sup>58</sup> the American Declaration of the Rights and Duties of Man,<sup>59</sup> the ACHR 1969<sup>60</sup> and in the Additional Protocol in the Area of Economic, Social and Cultural Rights.<sup>61</sup>

The Inter-American system has two specialised supervisory institutions. They are, the Inter-American Commission on Human Rights<sup>62</sup> and the Inter-American Court of Human

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<sup>54</sup> Charter of the Organization of American States (signed 30 April 1948, entered into force 13 December 1951) 2 UST 2394, UNTS 48. The OAS is an inter-governmental organization and includes 35 members of the Americas.

<sup>55</sup> American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 at 1 (1969) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L/V/II.23 Doc 21 Rev 6 (1979) (ACHR).

<sup>56</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series 69 reprinted in 28 ILM 156 (1989) (Protocol of San Salvador).

<sup>57</sup> D Shelton, 'The Promise of Regional Human Rights Systems' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 381.

<sup>58</sup> Charter of the Organisation of American States (signed 1948, entered into force 13 December 1951) 33 ILM 981 (1994) (OAS Charter) Preamble and article 3(d) and (k).

<sup>59</sup> American Declaration of the Rights and Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V /II.82 Doc 6 Rev 1 at 17 (1992) article XXVIII.

<sup>60</sup> ACHR (n 55) Preamble and Article 29(d) and 32(r).

<sup>61</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V /II.82 Doc 6 Rev 1 at 67 (1992) (Protocol of San Salvador) Preamble.

<sup>62</sup> The Inter-American Commission on Human Rights was established in 1959 through a resolution of ministers of foreign affairs of the OAS. Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago, Chile (12-18) August 1959. OAS Off Rec OEA/Ser F/II.5 Doc 89 Rev 2 (1959) 10-11.

Rights<sup>63</sup>. The ACHR empowers the Commission to deal with individual petitions and inter-state communications.<sup>64</sup> The Second Special Inter-American Conference, Rio de Janeiro 1965, approved a resolution strengthening the legal authority of the Commission further.<sup>65</sup> Through this resolution, the Commission developed a new area of competence that of acting in individual petitions for alleged violations of some of the human rights, including freedom of religion enumerated in the ACHR. Since then, the examination of individual complaints has become one of the Commission's main activities. The Commission has documented a number of gross and systematic violations of human rights over the years, using the information to pressurise states to redress the situation.<sup>66</sup>

When the ACHR came into force, the Commission acquired a new status within the system which was further improved with the establishment of a judicial organ, the Inter-American Court of Human Rights.<sup>67</sup> The Court declared that the intention of all the American states, as expressed in the Preamble of the Convention, is to consolidate in the hemisphere within the framework of democratic institutions a system of personal liberty and social justice based on respect for the essential rights of man.<sup>68</sup> The establishment of the Inter-American Court, which has both adjudicatory and advisory jurisdiction, which is broader than that of the European Court, provided a judicial forum for the determination of individual complaints, further developing work of the Commission.<sup>69</sup> The Court may issue advisory opinions to all member states of the OAS as well as the OAS organs.<sup>70</sup>

An evaluation of the Inter-American regional system in the promotion and protection of human rights within the Americas highlights the fact that regional institutions can coexist with the UN system and improve the efficiency of the protection. Earlier, the region had

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<sup>63</sup> ACHR (n 55) art 33(b), 52-69. The Court is situated in San Jose, Costa Rica.

<sup>64</sup> ACHR (n 55) art 44 and 45.

<sup>65</sup> Second Special Inter- American Conference, Rio de Janeiro, Brazil, 17-30 November 1965, Final Act OAS Res XXII, OEA/Ser C/I.13 (English) 32-4 reprinted in 60 AJIL 445 (1966).

<sup>66</sup> J Rehman, *International Human Rights Law: A practical Approach* (Pearson, London 2003) 211.

<sup>67</sup> H Caminos, 'The Inter-American System for the Protection of Human Rights' in J Symonides (ed), *Human Rights International Protection, Monitoring, Enforcement* (Ashgate, Burlington 2003) 193.

<sup>68</sup> ACHR (n 55) Preamble [1].

<sup>69</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 360.

<sup>70</sup> CM Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Netherlands Institute for Social and Economic law Research, Utrecht 1988) 326.

witnessed massive violation of human rights under military regimes, and subsequent return to democracy in several Latin American states has undoubtedly improved the human rights situation in the region.<sup>71</sup> The cooperation of member states has been limited and there is lack of coordination between the commission and the court. Many parties to the OAS have not ratified the ACHR and hence it is beyond the purview of the Inter-American Court to deal with human rights violations and to provide legally binding judgements. Although non-compliance is a problem in this region, nevertheless, it has remained operational and produced some contribution in the field of human rights.

#### 5.2.4. African Regional human rights regime

The youngest developed regional system is to be found in Africa. Although Africa has a recent history of oppressive regimes and serious systematic violations of human rights, it has succeeded in developing a coherent regional system for the protection of human rights. On 27 June 1981, the Assembly of Heads of State and Government of the OAU at its eighteenth assembly adopted the African Charter on Human and Peoples' Rights (AFCHPR).<sup>72</sup> AFCHPR has at its core the protection of human rights which means the unqualified and universal protection of the dignity of the human person. It became effective on the 21 October 1986 and so far fifty-three states have ratified the Charter. The African Charter differs from other regional human rights treaties due to inclusion of 'peoples' rights' and economic, social and cultural rights.<sup>73</sup>

The Charter initially established only an African Commission on Human and People's Rights.<sup>74</sup> A significant fact about the African system is the participation of NGOs which has strengthened<sup>75</sup> its human rights mechanism, the African Commission on Human and Peoples Rights. The African Commission has received a number of complaints concerning

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<sup>71</sup> H Caminos, 'The Inter-American System for the Protection of Human Rights' in J Symonides (ed), *Human Rights International Protection, Monitoring, Enforcement* (Ashgate, Burlington 2003) 199.

<sup>72</sup> The African Charter on Human and peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 ILM 58 (African Charter).  
<[http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html)> accessed 10 March 2007.

<sup>73</sup> GW Mugwanya, *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational, New York 2003) 47.

<sup>74</sup> African Charter (n 72) art 30. The African Commission is the main executive organ in charge of implementing the African Charter.

<sup>75</sup> R Murray, *The African Commission on Human and People's Rights and International Law* (Hart, Oxford 2000) 102.

grave violation of human rights through the NGOs, which is a rare phenomenon in other regional systems.<sup>76</sup> Recent establishment of an African Court on Human and Peoples Rights is a positive development but its effectiveness remains to be seen.<sup>77</sup>

The African human rights system which is mainly based on the African Charter has only had limited success in protecting human rights in the African region.<sup>78</sup> The weak economic and political democracy does not allow the African human rights institutions to function effectively.<sup>79</sup> The transformation of the Organisation of African Unity into the African Union (AU) in 2001 has brought with it much hope in promoting and protecting human rights.<sup>80</sup> However, there is still a lack of political will existing among the political leaders in strengthening democracy, rule of law and civil society. As pointed out by Nanchira, it will be a difficult task for the African Union to guarantee or ensure the protection of human rights unless individual African states do fulfil them in their respective states.<sup>81</sup>

### 5.2.5. Conclusions

From the above analysis of existing principal regional human rights organs, it can be ascertained that if a region is flourishing with democracy, rule of law and independent judiciary, as in the European region, the regional human rights system is effective in promoting and protecting human rights.

Another lesson from the analysis shows poor economical growth affects the goal of protection of human rights. This again can be proved from the inadequate protection of human rights in Americas and Africa whereas protection of human rights has flourished in

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<sup>76</sup> Rule 72, Rules of Procedure of the African Commission on Human and People's Rights, Doc ACPHR/RP/XIX (1996). <[http://www.hrcr.org/docs/African\\_Commission/afrcommrules7.html](http://www.hrcr.org/docs/African_Commission/afrcommrules7.html)> accessed 5 June 2006.

<sup>77</sup> The 1998 Protocol on the Establishment of an African Court on Human and Peoples' Rights established the African Human Rights Court. The Court is located in Arusha, Tanzania. FK Tiba, 'What Caused the Multiplicity of the International Courts and Tribunals?' (2006-2007) 10 *Gonzaga Journal of International Law* 202, 219-21.

<sup>78</sup> J Rehman, *International Human Rights Law: A practical Approach* (Pearson, London 2003) 265.

<sup>79</sup> Daniel DC Don Nanjira, 'The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights' in J Symonides (ed), *Human Rights International Protection, Monitoring, Enforcement* (Ashgate, Burlington 2003) 227.

<sup>80</sup> R Murray, *Human Rights in Africa: From the OAU to the African Union* (CUA, Cambridge 2004) 267.

<sup>81</sup> Daniel DC Don Nanjira, 'The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights' in J Symonides (ed), *Human Rights International Protection, Monitoring, Enforcement* (Ashgate, Burlington 2003) 235.

the European region owing to its economical growth and stability. This is significant since lack of funding for the human rights mechanisms make them ineffective in promoting human rights situations. All those factors establish the fact that developing a regional human rights system may depend on the existence of democracy, rule of law, independent judiciary, political will, economic growth and collective identity among member states and these are vital to strengthen regional cooperation.

Regional systems are essential intermediaries between offensive state institutions and the global system that is inadequate to redress all human rights violations. At the regional level, states seem more willing to have strong human rights monitoring mechanisms, such as commissions with broad mandates and courts with jurisdiction to pass binding and enforceable decisions. The habit of obedience to courts among states enhances the effectiveness of a regional system in the protection of human rights as seen in the European region.

The regional systems have now become part of the universal system for the protection of human rights and fundamental freedoms, operating under the limits of international law.<sup>82</sup> It can be argued that they are a positive development in the international human rights system. The individual human rights now receive more protection due to the enhanced arrangements set out by regional human rights courts. The continuing need for regional human rights systems arises as national societies produce their own kinds of human rights problems, threatening the rights and welfare of individuals and requiring the intervention of agencies above the national level.<sup>83</sup> It highlights the fact that the regions that lack human rights systems, such as South Asia have to enhance their efforts to create regional human rights systems.

### **5.3. Characteristics of South Asia**

The Ayodhya case study showed that the demolition of the Babri Masjid provoked inter-group violence which led to tension in neighbouring countries in the region leading to

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<sup>82</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 398.

<sup>83</sup> AG Mower Jr, *Regional Human rights: A Comparative Study of the West European and Inter-American Systems* (Greenwood, New York 1991) x.



attacks on minority communities over their sacred sites. Hence this section examines the nature of the South Asian region and explores the reasons for its failure to have a regional human rights regime to protect and promote fundamental human rights among its member states. Moreover, it becomes necessary to understand the religious dimension of the region where religious disputes threaten peace and stability in the region.

A region possesses certain common characteristics in terms of geography, economy, society, culture, and polity. South Asia can be easily identified as a region from its geographical continuity as well as geographical compactness. In addition to geographical compactness, the common experiences of British colonial rule which has led to the development of common political, administrative and legal institutions in these countries,<sup>84</sup> common bonds of religion, language and culture delineate South Asia as a region. The South Asian region which is inhabited by one fifth of the total world population and home for most poor people in a region, of approximately five hundred million, is 'known for both disparities and similarities'<sup>85</sup>. Stability and peace in South Asia is threatened by many factors such as economic deprivation, socio-religious tensions, mal-governance, internal conflicts, and inter-state tensions that lead to social and political collapse that could culminate in state failure.<sup>86</sup>

India occupies a central place in the region and holds almost seventy percent of the area.<sup>87</sup> Other countries of the region include Pakistan, Bangladesh, Bhutan, Nepal, Sri Lanka, Afghanistan<sup>88</sup> and Maldives and may be called peripheral countries from the point of view of their geographical location. Pakistan, Nepal, Bhutan, and Bangladesh have land borders with India while Sri Lanka and Maldives have sea borders. Against this backdrop, the

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<sup>84</sup> BD Jorgensen, 'South Asia: An Anxious Journey towards Regionalization?' in M Schulz and others (eds), *Regionalization in a Globalizing World: A Comparative Perspectives on Forms, Actors and Processes* (Zed Books, London 2001) 128.

<sup>85</sup> V Narain and BC Upreti, 'Introduction' in V Narain and BC Upreti (eds), *SAARC: A Study of Perceptions and Policies* (South Asian, New Delhi 1991) 3.

<sup>86</sup> The Asia Society, *South Asia and the United States after the Cold War: A study Mission* (Asia Society, New York 1994) vii-viii.

<sup>87</sup> JN Dixit, 'South Asian Regional Cooperation: Problems and Prospects' (1994) 1 South Asian Survey 221, 224.

<sup>88</sup> During the fourteenth South Asian Association for Regional Cooperation (SAARC) Summit, held in New Delhi, India on 3-4 April 2007, Afghanistan became a new member. 'Declaration of the Fourteenth SAARC Summit' <<http://www.saarc-sec.org/data/summit14/ss14declaration.htm>> accessed 5 May 2007.

smaller states of the region have developed a suspicion over the asymmetrical nature of India.<sup>89</sup> It can be stated that inter-state relations in South Asia have been India-centred. Most of the states in the region have one or other kind of bilateral problem with India.<sup>90</sup> Moreover, cultural affinities arising from the Indo-centric nature of the religious and ethno-lingual mosaic of South Asia remain a critical factor in promoting regional cooperation.<sup>91</sup> Muni claims that 'commonalities in South Asia are mostly bilateral between India and each of the neighbouring countries separately and individually. All the South Asian countries have only one thing in common and that is India'.<sup>92</sup>

The need to propose a regional convention to protect sacred sites in the South Asian region arises due to the continuation of various religious disputes which affect the regional peace and stability. South Asian states are multi-religious, plural societies.<sup>93</sup> Most of the major and minor religions such as Islam, Hinduism, Christianity, Buddhism, Jainism, and Sikhism exist in these countries. Indeed, this is not an exhaustive list and South Asia is home to various indigenous beliefs. Two major religions in this region are Islam and Hinduism. A strong discord remains between India and Pakistan, two major nuclear powers in the region. Jorgensen argues that 'politicized culture, and more specifically religion, is the most potent integrating and disintegrating factor in the region'.<sup>94</sup> The important dispute is the India-

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<sup>89</sup> SA Mujtaba, 'South Asia: Predicament and Prospects in the 21<sup>st</sup> Century' in NK Jha (ed), *South Asia in 21st Century: India, Her Neighbors and the Great Powers* (South Asian, New Delhi 2003) 65.

<sup>90</sup> For instance, the issue of Kashmir, Wallur Barrage, Sir Creek and Siachen quarrels create bilateral disputes between India and Pakistan relations. India and Bangladesh have problems over the issues of Talpaty, New Moore Island, illegal migration of Bangladeshis into India, water sharing and insurgency in North-eastern part of India. Nepal has problems over trade and transit and over Tnapur Hydel project with India. India blames Nepal for providing shelter to the insurgents who acts against India. Palk-strait, Kacchativu Island and Tamil refugees from Sri Lanka due to the ethnic conflict affect the Indo- Sri Lankan bilateral relations.

<sup>91</sup> S Fersh, *India and South Asia* (The Macmillan, New York 1971) 123.

<sup>92</sup> SD Muni and A Muni, *Regional Cooperation in South Asia* (National Publishing House, Delhi 1984) 56.

<sup>93</sup> For a detailed account on religious demography in South Asia, See, P Marshall (ed) *Religious Freedom in the World: A global Report on Freedom and Persecution* (Broadman & Holman, Nashville 2000). In **India**, Hindus 81%, Muslims 12%, Christians 3%, Sikhs 2% and Buddhists 0.9%; In **Pakistan**, Muslims 93% (Sunni Muslims 73% and Shia Muslims 20%), Ahmadiyahs 3%, Hindus 2%, and Christians 2%; In **Bangladesh**, Muslims 86.6%, Hindus 12.1%, Buddhists 0.6% and Christians 0.3%; In **Bhutan**, Buddhists 50-70%, Hindus 24-45%, Muslims 5% and Christians 1%; In **Nepal**, Hindus 85%, Buddhists 10%, Muslims 3% and Christians 2%; and in **Sri Lanka**, Buddhists 70%, Hindus 15%, Christians 8% and Muslims 7%. **Maldives and Afghanistan** are two Muslim majority nations while Christians, Hindus and Buddhists are minority communities.

<sup>94</sup> Ibid 129.

Pakistan quarrel over Kashmir which became part of India at Partition.<sup>95</sup> Pakistanis regard the accession of Kashmir to their country as being natural given that the subcontinent was divided on the basis of separate nationhood for the Muslim majority areas in western and eastern India.<sup>96</sup> In the last fifty years, India and Pakistan have fought three wars over Kashmir.<sup>97</sup>

Recently, India and Pakistan have been witnessing the rise of political extremism in both countries. In India, the rise of the Hindu religious militant groups known as the *Sangh Parivar* was part of a more general drift to political conservatism that swung electoral support to the Hindu nationalist party, the BJP. The *Sangh Parivar* has generally been supportive of a hard stand on relations with Pakistan. The Hindu militant groups call for a more proactive policy against Pakistan over Kashmir and it will only increase the dangers of confrontations between two countries.<sup>98</sup> In addition, if there are terrorist strikes against India, as happened a few times in the recent past,<sup>99</sup> allegedly by Islamic militant groups or groups related to Al Qaeda, the pressures on India to retaliate in some way and the provocation would be intense. Recently, any campaign by Hindu militant groups to build a temple on the site, where the Babri Mosque stood before its demolition, invokes tension among Hindus and Muslims in India.<sup>100</sup>

The Afghan conflict and the rise of the Taliban made Pakistan a home to a more militant Islam.<sup>101</sup> Some of these religious extremist groups have focused on the liberation of Kashmir from 'Hindu' India. These groups are capable of disrupting any accords with New Delhi by raising the level of violence in Kashmir or by accusing Pakistani rulers of 'selling

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<sup>95</sup> SA Husain, 'Prospects of Peace in South Asia: Politico-Strategic Perspective' (1994) 1 South Asian Survey 239, 240-41.

<sup>96</sup> S Ganguly, *The Origins of War in South Asia: Indo-Pakistani Conflicts Since 1947* (Westview, Boulder 1994) 34.

<sup>97</sup> B Prasad, 'Prospects for Greater Cooperation in South Asia: The Political Dimensions' in E Gonsalves and N Jetly (eds), *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage, Delhi 1999) 63.

<sup>98</sup> PS Ghosh, *BJP and the Evolution of Hindu Nationalism* (Manohar, New Delhi 2000) 319-25.

<sup>99</sup> There were terrorist attacks in crowded sacred sites such as *Akshardham* temple (Gujarat) on 24 September 2002, *Raghunath* temple (Jammu-Kashmir) on 26 November 2002 and in Ayodhya mosque-temple premises on 5 July 2005.

<sup>100</sup> Correspondent, 'BJP Kicks Off Campaign in Uttar Pradesh: Vows to Build Ram Temple' *The Hindu* (New Delhi 26 March 2007).

<sup>101</sup> K Bajpai, 'Managing Conflict in South Asia' in PF Diehl and J Lepgold (eds) *Regional Conflict Management* (Rowman & Littlefield, New York 2003) 218.

out'.<sup>102</sup> In the same way in Bangladesh, the rise of right-wing Islamic parties and groups has affected the conduct of both domestic and foreign policies.<sup>103</sup> These developments suggest that politico-religious militant groups are particularly effective on matters of South Asian relations.<sup>104</sup> The influence of the Islamic right and the military in Pakistan and Bangladesh coupled with the Hindu militarization may destabilise the South Asian region.<sup>105</sup>

Apart from religious extremism, South Asian societies have a complex and difficult agenda as they live in the twenty-first century. They have embraced democracy but it has to be made effective down to the grassroots level. Political discord and divergences in the political systems are integral aspects of South Asian politics.<sup>106</sup> For instance, a couple of democracies (India and Sri Lanka) along with two monarchies (Bhutan and Nepal), two so-called democracies which are in reality dominated by the armed forces (Bangladesh and Pakistan), and one non-party Presidential system (the Maldives) are included in the South Asian region highlighting the competing ideologies and conflicting politics.<sup>107</sup> However, South Asia has the advantage of civil society networks that can work across borders since people in one country are not strangers to the neighbouring country in terms of language, religion and other ethnic characteristics.<sup>108</sup> This emphasizes the need to strengthen democracy in the region to enhance the cooperation in South Asia.

As Mallick observed, history in South Asia has been loaded with severe and deep-rooted conflicts between religious and ethnic communities.<sup>109</sup> At present, almost every state in

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<sup>102</sup> I Hussain, 'Waiting to Exhale: Pakistan can Pull Back from the Abyss' *Times of India* (New Delhi 28 September 2001).

<sup>103</sup> SA Mujtaba, 'South Asia: Predicament and Prospects in the 21<sup>st</sup> Century' in NK Jha (ed), *South Asia in 21st Century: India, Her Neighbors and the Great Powers* (South Asian, New Delhi 2003) 64.

<sup>104</sup> K Bajpai, 'Managing Conflict in South Asia' in PF Diehl and J Leppgold (eds), *Regional Conflict Management* (Rowman & Littlefield, New York 2003) 232.

<sup>105</sup> Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India' (2003) 16 *Harv Hum Rts J* 41, 41.

<sup>106</sup> B Prasad, 'Prospects for Greater Cooperation in South Asia: The Political Dimensions' in E Gonsalves and N Jetly (eds), *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage, Delhi 1999) 69.

<sup>107</sup> R Mahan, 'From Sphere of Suspicion to Area of Amity: A Perspective on SAARC' in V Narain and BC Upreti (eds), *SAARC: A Study of Perceptions and Policies* (South Asian, New Delhi 1991) 15.

<sup>108</sup> SHM Kumar, 'Democratic Paralysis in South Asia: Major Issues and India's Concerns' (2006) 62 *India Quarterly: A Journal of International Affairs* 125, 147.

<sup>109</sup> R Mallick, *Development, Ethnicity and Human Rights in South Asia* (Sage, New Delhi 1998) 28.

South Asia is troubled by serious ethnic conflicts.<sup>110</sup> The fragility of the South Asian region has strongly contributed to the internationalisation of ethnic conflicts. The issue of refugees, which has been the result of decades of ethnic conflict, has further complicated the region and put constraints on the safety and security of states and people. Against this backdrop, South Asia 'would clearly be one of the most persistently and seriously affected'<sup>111</sup> regions concerning violations of human rights. Therefore, the peaceful existence of South Asia as a region depends upon how these states can settle their disputes amicably and protect human rights within their states.

#### **5.4. Modalities of making a treaty under international law in South Asia**

Previous sections examined the advantages of regional human rights organisations and demonstrated the need to develop a human rights mechanism to protect sacred sites as part of protecting freedom of religion in South Asia. This section analyses how regional human rights systems are established, why states consent to become members of such a regime although it constrains their sovereignty and what benefits accrue to these states by membership of such a regional human rights organization. The answers to these questions come out from three international relation theories namely, the Realist theory, the Ideational theory, and the Republican Liberal theory. By examining each of these theories, a more finessed approach to proposing a regional human rights convention in the South Asian region may be arrived at.

In various regions, states construct international human rights systems to adjudicate and enforce human rights. Moravcsik candidly observes that international human rights institutions are 'not designed primarily to regulate policy externalities arising from societal interaction across borders, but to hold governments accountable for purely internal activities'.<sup>112</sup> The regional systems empower the individuals to challenge the domestic activities of their own government which has now become a defining characteristic of regional human rights systems. Such individual claims are taken up in independent courts

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<sup>110</sup> U Phadnis, *Ethnicity and Nation-Building in South Asia* (Sage, New Delhi 1989) 243.

<sup>111</sup> SD Muni and LR Baral (eds), *Refugees and Regional Security in South Asia* (Konark, Delhi 1996) 6.

<sup>112</sup> A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, 217.

and commissions<sup>113</sup> attached to such regional systems and they are adjudicated upon as to whether the application of domestic rules or legislation violates international commitments and so as to establish the rights of individuals.

The significant example is the European regional human rights system. The ECHR, established under the auspices of the Council of Europe is widely accepted as the 'most advanced and effective international regime for formally enforcing human rights in the world today'.<sup>114</sup> In many cases brought before the ECHR, governments have amended legislation, granted administrative remedies, reopened judicial proceedings, or paid monetary damages to individuals whose treaty rights were violated.<sup>115</sup> Here, the question arises as to why states agree to establish an independent international human rights system, which limits their domestic sovereignty. Moravcsik evaluates the existing realist, ideational and republican theories and proposes republican liberalist theory to explain the emergence and expansion of formal human rights systems.<sup>116</sup>

The first theory is Realist theory which stresses the distribution of inter-state bargaining power. Realist theory insists that governments accept international obligations because they are compelled to do so by great powers. Establishment of a binding human rights system requires a group of great powers willing to coerce or induce disobedient states to accept, adjust to and comply with international human rights norms. For instance, Jack Donnelly writes of the Inter-American Convention on Human Rights that, 'the United States ...exercised its hegemonic power to ensure its creation and support its operation'.<sup>117</sup> Another example may be that in cases of many developing countries, the acceptance of human rights norms is linked to the pressure by international financial organizations such

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<sup>113</sup> In Inter-American system, there is no *locus standi* for the individual before the Inter-American Court. Individuals are allowed to submit petitions before the Commission and the Commission may submit a case to the Court. ACHR (n 55) art 61.

<sup>114</sup> Henkin and others, *Human Rights* (Foundation, New York 1999) 551.

<sup>115</sup> BE Carter and PR Trimble, *International law: Selected Documents* (2<sup>nd</sup> edn Little, Boston 1995) 309.

<sup>116</sup> A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, 219.

<sup>117</sup> J Donnelly, *International Human Rights: A regime Analysis* (1986) 40 *International Organization* 599, 637-8.

as the World Bank which is mainly controlled by western and developed donor countries.<sup>118</sup> In summary, Realist theory proposes that the regional superpowers play a vital role in establishing a regional human rights system by pressurising other nations in the region.

If the Realist theory is applied to South Asia, the two major powers, India and Pakistan have not played a major role in establishing the South Asian Association for Regional Cooperation (SAARC), but it was proposed by a smaller member, Bangladesh. It is true that the protection of human rights is not a stated concern of the SAARC, rather it is a political and economical organisation aiming to protect and promote peace and stability in the region. Even after twenty years, SAARC could not establish itself as an active regional organisation due to the rivalry between India and Pakistan. It shows that in order to establish a regional human rights system in South Asia, these two major powers have to agree to bury their differences primarily.

The second theory is the Ideational theory which brings in altruistic motivations and the persuasive power of principled ideas to explain the emergence and enforcement of human rights regimes.<sup>119</sup> It is argued that governments accept binding international human rights norms because they are persuaded by the overpowering ideological and normative appeal of the values lie beneath them.<sup>120</sup> Hence according to Ideational theorists, the motivating force behind human rights regimes is not rational adaptation but trans-national socialization.<sup>121</sup> Mainly the changes occur through the impact of principled non-governmental organizations (NGOs) on domestic and trans-national opinion.<sup>122</sup> NGOs and

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<sup>118</sup> A Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford University Press, California 1994) 51-6.

<sup>119</sup> For a detailed study, ME Keck and K Sikkink *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca 1998) chap 1-3. The authors observe that the interaction of many non-state actors is structured in terms of networks and they are increasingly visible in international politics. Some of these are networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation.

<sup>120</sup> J Donnelly, 'International Human Rights: A regime Analysis' (1986) 40 *International Organization* 599, 638. Donnelly observes that the seemingly inescapable ideological appeal of human rights in the postwar world is an important element in the rise of international human rights regime.

<sup>121</sup> M Finnemore and S Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887, 902-904.

<sup>122</sup> M Finnemore, *National Interests in International Society* (Cornell University Press, Ithaca 1996) 34-5; K Sikkink 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in J

civil society within established democracies set up trans-national networks dedicated to the advancement of human rights which in turn mobilises domestic and trans-national civil society at home and abroad.<sup>123</sup>

Moreover, domestic democracy and a state's commitment to the 'rule of law' extend the support for international human rights. The more democratic they are, the more likely their espousal of human rights values. This view is stressed by Kupchan and Kupchan by stating that, 'states willing to submit to the rule of law and civil society are more likely to submit to their analogues internationally'.<sup>124</sup> States observe international law through their acceptance of international rules which usually mirrors with domestic values. Moravcsik concludes that 'governments promote norms abroad because they are consistent with universal ideals to which they adhere; governments accept them at home because they are convinced doing so is appropriate'.<sup>125</sup>

When Ideational theory is applied to South Asia, it reveals the disadvantages existing in that region. Strong democracies and rule of law are *sine qua non* for the origin of regional human rights system. However, in South Asia, although all member states have nominally accepted democracy and rule of law, it is not very strong. Except India and Sri Lanka, other nations struggle with the democratic system.<sup>126</sup> Against this background, the countries in South Asia may not be prepared to establish a human rights system mainly due to lack of democracy and rule of law. Positively, in many of these states, civil society and NGOs are active and enjoy much mobilising capacity owing to their religio-political affiliations. The

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Goldstein and RO Keohane (eds), *Ideas and Foreign Policy: Belief, Institutions, and Political Change* (Cornell University Press, Ithaca 1993).

<sup>123</sup> ME Keck and K Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca 1998) 1-38.

<sup>124</sup> CA Kupchan and CA Kupchan, 'Concerts, Collective Security, and the Future of Europe' (1991) 16 *International Security* 114, 115-6.

<sup>125</sup> A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, 224.

<sup>126</sup> Nepal until recently was monarchical, although elections were conducted occasionally; elected governments in Pakistan were toppled by military generals and mostly it was under military regime; religious militancy disrupts democracy in Bangladesh; Taliban, a religious militant outfit, ruled Afghanistan for a while and now it undergoes internal strife; it is monarchical form of government in Bhutan although recently the king expressed his willingness to share power with the people through elected Assembly; though elections are conducted in Maldives, predominantly a Muslim country (political parties started only in 2005), for the last thirty eight years it has seen only two presidents.



economic disparities, illiteracy, ethnic conflicts, however, appear to have prevented the NGOs from reaching the grass root of societies and their influence in shaping the society for democracy and rule of law is minimal. Ideational theory exposes the weakness of the South Asian region and perhaps the time is ripe for these states to restore democracy fully in their countries which will pave the way to establish a regional human rights system.

The third theory called the 'Republican Liberal theory' explains the motivation for establishing human rights regimes as resulting from instrumental calculations about domestic policies of a state.<sup>127</sup> This theory illustrates that states are self-interested and rational in their pursuit of underlying national interests which reflect variation in the nature of domestic social pressures and representative institutions.<sup>128</sup> Hence governments delegate power to international and regional human rights systems, to constrain the power of future governments. From this perspective, human rights norms are expressions of the self-interest of democratic governments in 'locking-in' democratic rule through the enforcement of human rights.<sup>129</sup> According to this theory, when states grant power to an international or regional body, they seek to achieve two things, firstly, to establish reliable constraints on future non-democratic governments and secondly, to prohibit democratically elected governments from subverting democracy subsequently.

An analysis of Republican Liberal theory shows that the strongest support for binding human rights systems comes from recently established and potentially unstable democracies rather than long established democracies. Often, weak and illegitimate leaders of developing countries view internal enemies as more dangerous than external ones and are therefore likely to select international alliances that undermine domestic opponents.<sup>130</sup>

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<sup>127</sup> A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217, 225.

<sup>128</sup> MW Doyle, 'Liberalism and World Politics' (1986) 80 American Political Science Review 1151-69; J Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Cornell University Press, Ithaca New York 1991).

<sup>129</sup> A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217, 226.

<sup>130</sup> SR David, 'Explaining Third World Alignment' (1991) 43 World politics 233, 236.

The established democracies also have a reason to promote such arrangements to strengthen the 'democratic peace' in neighbouring countries.<sup>131</sup>

When this theory is applied to South Asia, there is a hope for establishing a regional human rights system. A proposal for regional cooperation did not come from the established democracies such as India and Sri Lanka. In the 1970s, the newly established democracy, Bangladesh, took the initial step to promote a regional organisation, based on which the SAARC was created in 1985. Another example could be the Latin-American states where acceptance of compulsory jurisdiction of the Inter-American Court has occurred over the past two decades when most of these states turned to democracy. In the South Asian region, the two monarchical states, Nepal and Bhutan, have adopted democracy recently and Afghanistan, with the support of the western democracies, strives to strengthen democratic rule in the society. Recent attempts in Bangladesh to root out religious extremists and strengthen democracy by conducting general elections bolster the idea to establish a human rights system in the region.

To summarise, the above analysis points out that the South Asian region has the potential to establish its own human rights system. However, states need to develop their bilateral relations, strengthen democracy and establish rule of law in their respective countries. By adopting a new human rights treaty, SAARC nations may be able to promote and protect human rights in the region which will in turn contribute to the promotion of peace, stability and economical growth in the region.

### **5.5. Nature of South Asian Association for Regional Cooperation (SAARC)**

The Asia-Pacific is the only region of the world without its own regional human rights instrument.<sup>132</sup> However, political and economic cooperation is increasing in this region namely with groups such as the Association of South East Nations (ASEAN) and the Asia-Pacific cooperation. In 1997, an Asian Charter on Human Rights was drafted at the behest

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<sup>131</sup> B Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, Princeton 1993) 120-23.

<sup>132</sup> Fernand de Varennes (ed), *Asia-Pacific Human Rights Documents and Resources* (Martinus Nijhoff, The Hague 1998) Vol 1, 3.

of the Asian Human Rights Commission (AHRC).<sup>133</sup> However, the AHRC is only a non-governmental organisation and as such the Asian Charter does not have any legal standing under international human rights law.<sup>134</sup> At a 1996 UN sponsored workshop, thirty participant states concluded that 'it was premature, at the current stage, to discuss specific arrangements relating to the setting up of a formal human rights mechanism in the Asian and Pacific region'.<sup>135</sup> The main reason alleged for the lack of interest among the Asian states in establishing a regional human rights mechanism is the heterogeneity of the region with vast differences in economic, cultural, religious and political status.<sup>136</sup>

In South Asia, the SAARC is a regional organisation whose main function is to maintain peace and stability in the region. Since this peace and stability is threatened and undermined by religious militants and religious disputes, there is a need to promote religious amity and protection of freedom of religion in the region as a prerequisite to establishing region-wide peace and stability. Efforts at developing a framework for regional cooperation in South Asia started in the 1970s. The deepening economic crisis, poverty, border disputes and ethnic conflicts may have compelled these countries to think in terms of regional cooperation. Consequently, a concrete proposal for regional cooperation in South Asia came from the Bangladesh President, Zia-ur-Rehman, in May 1980.<sup>137</sup> While this proposal was endorsed by the smaller states at once, two major powers in the region, India and Pakistan, had initial reservations. Narain and Upreti observed that although the idea was acceptable to India, it decided to scrutinize it carefully, while Pakistan thought that such an idea would further strengthen the position of India in the region.<sup>138</sup> The proposal was finally realised in December 1985 and in spite of their initial reservations, India and Pakistan extended their support.<sup>139</sup>

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<sup>133</sup> Asian Human Rights Commission is a volunteer human rights activists group based in Hong Kong.

<sup>134</sup> Human Rights Watch, *World Report 2002: Asia Overview* <<http://hrw.org/wr2k2/asia.html>> accessed 10 May 2007.

<sup>135</sup> Bangkok Declaration on Human Rights 29 March-3 April 1993, UN Doc A/CONF/93.

<sup>136</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 364.

<sup>137</sup> BD Jorgensen, 'South Asia: An Anxious Journey towards Regionalization?' in M Schulz and others (eds), *Regionalization in a Globalizing World: A Comparative Perspectives on Forms, Actors and Processes* (Zed Books, London 2001) 138. Bangladesh became a democratic country in 1976.

<sup>138</sup> V Narain and BC Upreti, 'Introduction' in V Narain and BC Upreti (eds), *SAARC: A Study of Perceptions and Policies* (South Asian, New Delhi 1991) 6.

<sup>139</sup> R Mallick, *Development, Ethnicity and Human Rights in South Asia* (Sage, New Delhi 1998) 19.

From its inception in 1985, SAARC is viewed not only as a mechanism for cooperation in various functional and economic areas but also as an instrument of conflict management.<sup>140</sup> One of the constraints on SAARC is that its Charter specifically bans discussion of bilateral and contentious issues.<sup>141</sup> However, the association has provided a venue for bilateral diplomacy at the highest political levels. For instance, Indian and Pakistani leaders have often convened talks during regional summits.<sup>142</sup> Having said that, the progress in cooperation has been really slow and halting while the areas of conflict have multiplied and increased in intensity.<sup>143</sup>

For SAARC to move from its present position of being an organisation which deals primarily with economic and political considerations, it may have to reconsider the very principles upon which it was founded such as promoting peace, stability and amity, and achieving peace, freedom and social justice among its members.<sup>144</sup> Moreover, for an expansion of SAARC activities, it is important to involve the civil societies of South Asia to function as an effective pressure group.<sup>145</sup> Although suspicion and mistrust continues among its members as was highlighted by Cherian after the recent SAARC meeting held in Delhi in April 2007,<sup>146</sup> on a positive note, cooperation on issues such as cultural tourism,<sup>147</sup> trade agreements, opening borders for trade, and the fight against terrorism shows that there has been advancement in mutual understanding and tolerance among the member states.<sup>148</sup>

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<sup>140</sup> RM Hussain, 'SAARC 1985-1995' in E Gonsalves and N Jetly (eds), *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage, New Delhi 1999) 27.

<sup>141</sup> SAARC Charter art 10(2): Bilateral and contentious issues shall be excluded from the deliberations. 'SAARC Charter' <<http://www.saarc-sec.org/data/docs/charter.pdf>> accessed 10 May 2007.

<sup>142</sup> K Bajpai, 'Security and SAARC' (1996) 3 South Asian Survey 295-307.

<sup>143</sup> B Prasad, 'Prospects for Greater Cooperation in South Asia: The Political Dimensions' in E Gonsalves and N Jetly (eds), *The Dynamics of South Asia: Regional Cooperation and SAARC* (Sage, Delhi 1999) 63.

<sup>144</sup> The Preamble of the SAARC Charter.

<sup>145</sup> B Singh, 'Regional Cooperation in South Asia: Problems and Prospects' (2005) 12 South Asian Survey 177, 183-4.

<sup>146</sup> J Cherian, 'Miles to Go' *Frontline* (New Delhi 7-20 April 2007) <<http://www.hinduonnet.com/fline/fl12407/stories/20070420003202700.htm>> accessed 15 May 2007.

<sup>147</sup> Correspondent, 'India to develop Buddhist tourist circuit' *The Hindu* (New Delhi 27 April 2007). <<http://www.hindu.com/thehindu/holnus/002200704271240.htm>> accessed 10 May 2007. Recently, India has agreed to develop a 'Buddhist tourist sites' in South Asia.

<sup>148</sup> SAARC, 'Declaration of the Fourteenth SAARC Summit' <<http://www.saarc-sec.org/data/summit14/ss14declaration.htm>> accessed 18 May 2007.

With regard to the role of the international community, in the past, during the Cold-War era, the superpowers had no direct interest in the success or failure of SAARC. Subsequent to the end of the Cold-War, there is now a new realisation and determination among the major powers in the success of SAARC as a regional organisation which may be used to resolve growing tensions such as religious terrorism, ethnic conflicts and refugee crisis. This is evidenced by the presence of the delegates of 'observer countries'- China, South Korea, Japan, the United States and the European Union in the recent meeting held in Delhi on 3 and 4 April 2007.

Calvocoressi observes that 'by their very nature, regional groups are centripetal, fostering a sense of belonging, and are likely to increase cooperation within their geographical area'.<sup>149</sup> This aspect is basis for both the foundation of SAARC and for building up confidence through dialogue between its members. When SAARC came into being in 1985, one of its important objectives was to promote the welfare of the people and to improve their quality of life. In trying to achieve this stated objective, it is necessary for the various governments to maintain political stability and there has to be a community based on peaceful coexistence, economic cooperation, religious tolerance and cultural understanding. However, the spill-over effect of domestic conflict to other countries threatens the peace and stability of the region.<sup>150</sup> Therefore as a prerequisite of achieving the above goals, the various governments of SAARC have to cooperate together to counter the potential threat of religious militants who operate within nations and across borders.<sup>151</sup> There are common commitments among member states to uphold the regional undertakings such as SAARC Regional Convention on Suppression of Terrorism (1987), the SAARC Convention on Narcotic Drugs and Psychotropic Substances (1993) and SAARC Law.<sup>152</sup>

For SAARC to work effectively there has to be the political will to ensure that the core principles proposed in its Charter are used to widen its scope to take in the field of human

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<sup>149</sup> P Calvocoressi, *World Order and New States* ( Chatto and Windus, London 1962) 60-7.

<sup>150</sup> N Jetly, 'Democratization and Regional Cooperation in South Asia' in Coordinating Group for Studies on South Asian Perspectives, *Perspectives on South Asian Cooperation* (Friedrich Ebert Stiftung, Islamabad 1994) 97.

<sup>151</sup> KK Bhargava, 'South Asian Regional Cooperation: Vision, Goals, and Strategies (1996-2005) in S Ghosh and S Mukherjee (eds), *Emerging South Asian Order: Hopes and Concerns* (Media South Asia, Calcutta 1995) 38.

<sup>152</sup> SD Muni, *Responding to Terrorism in South Asia* (Manohar, New Delhi 2006) 172.

rights.<sup>153</sup> As long as a lack of political will persists, it may not be possible to have even a normal level of regional cooperation which one can understand from the experience of the Inter-American system until the 1970s. However, recent efforts to improve the bilateral relations among member states of SAARC raises optimism, especially, the ongoing dialogue between India and Pakistan, wherein remains a sign of hope within the South Asian region.<sup>154</sup>

In summary, SAARC is a regional organisation whose main function is to maintain peace and stability in the region. Since this peace and stability is threatened and undermined by religious militants and religious disputes, such as the Babri Masjid dispute, there is a need to promote religious amity and protection of freedom of religion in the region as a prerequisite to establishing region-wide peace and stability. Therefore, a regional convention to protect sacred sites as part of freedom of religion is a necessary step towards promoting and protecting fundamental human rights in this part of the world. Given the widely diverging political, cultural and religious differences, it is to the credit of all the members of the SAARC that they have kept the organisation going from its inception in 1985 till its present day.

#### **5.6. A draft model of the regional convention for protection of sacred sites with justification commentary**

One of the aims of this research is to propose new measures for developing international law to protect sacred sites. This model convention is designed to explore how the wall of mistrust and suspicion plaguing South Asian states can be replaced by erecting a platform for peaceful and mutually advantageous coexistence, how an atmosphere of apprehension and hostility can be transformed into an environment of amity and harmony. To achieve this, a convention for the protection of sacred sites is a first step.

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<sup>153</sup> D Tsering, 'SAARC - A Personal Viewpoint' in S Ghosh and S Mukherjee (eds), *Emerging South Asian Order: Hopes and Concerns* (Media South Asia, Calcutta 1995) 24.

<sup>154</sup> B Singh, 'Regional Cooperation in South Asia: Problems and Prospects' (2005) 12 *South Asian Survey* 177, 185.

Every article is followed by a commentary which aims at providing a justification for those articles contained in the proposed model convention. The focus of the commentary will be on why, and for what purpose, a particular article has been included and will also provide a definition of various important terms used. The main sources for the commentary are the International Covenant on Civil and Political Rights (ICCPR),<sup>155</sup> the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief<sup>156</sup> (1981 UN Declaration on Religious Intolerance) and the European Convention on Human Rights (ECHR).

The ICCPR is an internationally binding treaty which is the reason it has been selected. ICCPR has established a treaty-based human rights mechanism, the Human Rights Committee which monitors the compliance of the provisions by the state's parties. The 1981 UN Declaration on Religious Intolerance is the only international instrument for protecting freedom of religion although, as a soft law instrument, it does not have binding effect. Thus it does not have effective implementing mechanisms. At regional level, the basis for the commentary will be the European Convention on Human Rights and cases decided by the European Court of Human Rights. ECHR is chosen for the reason that it represents a collective guarantee in the European context of a number of principles set out in the UDHR, supported by international judicial machinery and its decisions are respected by member states.<sup>157</sup>

### 5.6.1. Preamble

Recalling that one of the basic principles of the Charter of the United Nations is that to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

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<sup>155</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>156</sup> UNGA Res 36/55 (25 November 1981) UN Doc A/RES/36/55.

<sup>157</sup> JAC Salcedo, 'The Place of the European Convention in International law' in RSJ Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993) 16.

Recalling that one of the basic principles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights is that every person has the right to freedom of thought, conscience and religion, and freedom, either alone or in community with others, and in public or private to manifest one's religion in teaching, practice, worship and observance,

Considering that freedom of religion, in many countries, is infringed by attacking sacred sites belonging to particular religious communities leading to egregious human rights violations within states and exacerbates tension and violence in other states where the members of the same religious communities live or settled,

Convinced that disputes over sacred sites and attacks on them destabilize peace and security in the region and that it is essential to promote understanding, tolerance, and respect in matters relating to freedom of religion so as to foster international and regional cooperation among states,

Concerned by the existence of discrimination in the granting of permission to establish, maintain sacred sites belonging to minority religious communities and in allowing them to be fully and freely used for religious purposes and concerned at the inadequate protection given to such sites,

Considering that the aim of the regional organisation SAARC is promoting peace, stability, amity and progress and such aim has to be pursued in the maintenance and further realization of human rights and fundamental freedoms,

Convinced that it is essential to give particular attention to the protection of sacred sites as part of the protection and promotion of rights of freedom of religion and also rights of minority religious communities which cannot be disassociated from maintaining peace and stability in the South Asian region,



All Contracting Parties resolve hereby to adopt all necessary measures for the protection of sacred sites to protect and promote the human rights and freedoms, in particular the right to freedom of religion within their jurisdiction,

Now, therefore the member states of the SAARC proclaim this regional convention on the protection of sacred sites in South Asia.

Commentary: The preamble delineates the need to develop a convention for protection of sacred sites in South Asia. Sacred sites are essential for the full enjoyment of freedom of religion and hence are an important focal point in the life of religious communities and individual adherents. Within sacred sites, adherents of a religion manifest their faith in worship as part of exercising their fundamental religious human rights. Therefore, when these sites come under attack or destruction, this may affect the social cohesion of the society and in certain occasions may have regional and global implications and/or repercussions. For instance, when the Al Aqsa mosque in Jerusalem is attacked, sporadic violence erupts in many Muslim countries. A recent attack on the Imam al-Aksari mosque, a Shiite shrine known as golden mosque, in Samarra, Iraq led to nationwide sectarian attacks<sup>158</sup> and violence broke out in many Muslim countries, including India. Moreover, in many sacred site disputes, apart from affecting one's religious rights they also lead to other violations of human rights such as right to life, right to peaceful assembly, right to free expression, and rights of minorities.

Many modern states are heterogeneous and include in their populations multiple minority religious groups. How a society deals with them indicates how impartially the society operates.<sup>159</sup> In general, religious minorities enjoy protection and equality before the law in democratic societies. By contrast, the South Asian countries have a far from satisfactory record of freedom of religion, particularly with respect to the freedom of religious minorities. The exploitation of religious sentiments by religious and political groups is

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<sup>158</sup> 'Shiite Leaders Appeal for Calm after New Shrine Attack' *The New York Times* (New York 13 June 2007) <<http://www.nytimes.com/2007/06/13/world/middleeast/13cnd-samarra.html?hp>> accessed 13 June 2007.

<sup>159</sup> UNCHR 'Report of the Secretary-General on Regional Arrangements' (26 January 1996) UN Doc E/CN.4/1996/46.

common as an attempt to enhance their political power.<sup>160</sup> Sensitization of any religious disputes often leads to the escalation of tension among different religious communities and results in attacks on sacred sites belonging to them. Since major religions such as Hinduism, Islam, Buddhism and Christianity are represented in almost all countries in the South Asian region, the spill-over effect of religious disputes and attacks on minority religious communities in one country creates tension in other countries and can lead to widespread attacks on sacred sites of other religious communities.<sup>161</sup> Moreover, the recent growth of religious extremism in South Asia<sup>162</sup> threatens the stability and peace of the region.

The following draft articles are based on the international recognition that religion plays a special role in many societies which needs to be protected by international law. As mentioned in the preamble, these articles are compatible with international human rights treaties.

#### **5.6.2. Article 1 - Right to sacred sites is a fundamental component of the right to freedom of religion**

1.1 Every religious group shall have a right to establish sacred sites and to manifest therein their faith through worship, observance, practice and teaching.

1.2 Every religious individual and group shall have the right to undertake pilgrimage to sacred sites both within and outside one's country.

1.3 Indigenous peoples living within the South Asian region shall have the right to their sacred sites, ceremonial objects and the remains of their ancestors. States shall undertake special measures and assist indigenous peoples to preserve and protect their sacred sites.

Commentary: Article one articulates that right to sacred sites as part of the fundamental right to religion. The reason for looking at protection of sacred sites stems from the

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<sup>160</sup> R Masood, *Towards a New Regional Order in South Asia* (Media House, Delhi 2004) 135-36.

<sup>161</sup> SA Mujtaba, 'South Asia: Predicament and Prospects in the 21<sup>st</sup> Century' in NK Jha (ed), *South Asia in 21<sup>st</sup> Century: India, Her Neighbors and the Great Powers* (South Asian, New Delhi 2003) 64-5.

<sup>162</sup> H Habib, 'Media Meet Vows to Resist Religious Extremism' *The Hindu* (New Delhi 27 May 2007) <<http://www.hindu.com/thehindu/2003/05/27/stories/2003052704651200.htm>> accessed 30 May 2007.

importance of religion in global politics. There is a wide religious reinterpretation taking place owing to many changes at both national and global level. Religious belief remains one of the essential manifestations of culture.<sup>163</sup> Religion as a cultural phenomenon continues to manifest itself as a force for social and political conflicts, violence, and repression. For instance, in secular India, the growth of militant Hinduism, which focused on the Babri Masjid dispute, transformed the political characteristics in that country.<sup>164</sup> Moreover, there are socially conservative religious groups, often regionally or nationally focussed, working to alter fundamentally the political scene, sometimes by resorting to violent tactics, for example, Hindu militant groups in India, Islamic militant groups in Pakistan and Bangladesh and Taliban militia in Afghanistan.<sup>165</sup> However, having said that, it may not be denied that religions also promote ideals of harmonious living with traditions that enrich contemporary understanding of international human rights with models of universal respect.

As noted in the preamble, sacred sites are an essential component in manifesting the fundamental right to freedom of religion. This raises the question what is meant by the term 'religion', and therefore it becomes necessary to explore how a definition of the term could be arrived at.

Shelton and Kiss observed, 'defining religion is probably the most difficult exercise in drafting a law for religious liberty'.<sup>166</sup> Perhaps this is why a definition of religion does not appear in the UDHR, the ICCPR or in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. However, the ICCPR is the only binding international covenant which has decided to leave the application and interpretation of relevant law to the definition to its implementation mechanism, the Human Rights Committee. The regional human rights systems seems to

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<sup>163</sup> J Haynes, 'Religion' in L Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 23. Haynes defined that 'culture may mean people's feeling of separateness based on ethnicity, nationalism, religion and/or language'.

<sup>164</sup> See, *Babri Masjid-Ram Janmabhumi* case study on chapter 3.

<sup>165</sup> J Haynes, 'Religion' in L Gearon (ed), *Human Rights & Religion: A Reader* (Sussex Academic Press, Brighton 2002) 20.

<sup>166</sup> D Shelton and A Kiss, 'A Draft Model Law on Freedom of Religion, With Commentary' in Johan D van der Vyver and John Witte Jr (eds), *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff, The Hague 1996) 569.

emulate the international law, for instance, the ECHR has left the application and interpretation to its organ European Human Rights Court.

In general, although not exclusively, courts have placed their emphasis on the concept of 'supernatural' or 'metaphysical reality'<sup>167</sup> when defining religion. For instance, in the *Church of the New Faith* case, the Australian High Court stated that 'belief in a supernatural being, thing or principle and the acceptance of canons of conduct in order to give effect to that belief' are prerequisites of a religion'.<sup>168</sup> Occasionally, the courts have widened the definition to include those groups which may not necessarily believe in a supernatural being. In the *Strayhorn v ESA* case,<sup>169</sup> the Texas appellate court decided that 'while worship of a supreme being is an element of religion, it is not a dispositive factor'. However, courts may not deal with the metaphysical nature of a religious dispute rather they adjudicate on the manifestation of faith or acts performed in *forum externum*.

The only definition found in international human rights law instruments is given by the UN Special Rapporteur Benito who defines religion as, 'an explanation of the meaning of life and how to live accordingly. Every religion has at least a creed, a code of action and a cult'.<sup>170</sup> One of the significant shortcomings of this definition is the failure to include the 'community element'. This is especially important when addressing the rights of indigenous communities. Though all religions have a collective element, for indigenous religious groups, it is of prime concern for their practice and manifestation of their faith, which is always performed in a community. Hence, any definition of the term 'religion' needs to include the community interests of indigenous religions.

Although this lack of definition in international human rights law may remain as a weakness in interpreting and applying law in establishing the rights of religious communities, it has some advantages too. Peter Cumper points out that defining religion

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<sup>167</sup> PW Edge, *Religion and Law: An Introduction* (Ashgate, Aldershot 2006) 32.

<sup>168</sup> *The Church of the New Faith v The Commissioner for Payroll Tax* (1983) 154 CLR 120 (High Court of Australia).

<sup>169</sup> *Strayhorn v Ethical Society of Austin* (2003) 110 SW 3d 458, 463.

<sup>170</sup> UNCHR 'Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion and Belief by EO Benito' (1987) UN Doc E/CN.4/Sub.2/1987/26 [4].

would be an onerous task and any such definition would fail to include all the religious faiths and beliefs existing in the world and it might be couched in such broad terms that it would be difficult to apply in specific cases. Moreover, if the definition is interpreted too restrictively by States, minority faiths may face difficulties on trying to establish themselves as a religious group.<sup>171</sup> In addition, religions are creative and constantly evolving<sup>172</sup> which can be seen from the emergence of new beliefs and sects in various parts of the globe. Therefore, there exists the danger that any strict definition would not be fluid enough to take account of these new religious groups. Thus they might potentially suffer non recognition and as a result they might face discrimination and denial of their religious rights.

In considering the above reasons, for the purpose of the proposed Model Convention for the protection of sacred sites, a working definition for the term 'religion' is not given, instead it will leave the interpretation and application open to the proposed regional court to decide on a case by case basis. Thereby, the Model Convention is also in line with the tenor of international law concerning religion.

Another important term in Article One which needs to be defined is 'sacred sites'. This is dealt with in detail in the second chapter which sets the research context. For the model convention, the term might be defined as follows: sacred site refers to a specific geographical area with religiously significant buildings or structures, consecrated and holds regular religious and ceremonial functions.

There are two categories of sacred sites where interaction of law and religion occur in different ways. In the first category, buildings are used as sacred sites such as churches, mosques and temples. For a building to be identified as a sacred site, it must have a permanent structure within a landscape with clearly demarcated boundary and in many cases, owned by a religious community. In the second category, there are sacred sites where the boundaries are not well-defined and rather sacredness is attached to an area rather than

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<sup>171</sup> PW Edge, *Legal Responses to Religious Difference* (Kluwer law International, The Hague 2001) 6.

<sup>172</sup> Jeff Haynes, *Religion in Global Politics* (Pearson Education, Harlow 1998) 5.

a building, for instance, indigenous sacred sites. These sites are not bounded and are not owned by the religious community<sup>173</sup> that claims it as a sacred site for their worship and other religious activities.<sup>174</sup> Although buildings may exist in this area, the worship is not confined to the buildings alone and the whole landscape is considered sacred.

Sacred sites are useful to manifest therein one's faith in different forms such as worship, observance, practice and teaching.<sup>175</sup> This manifestation takes place externally and hence is considered an active part of the freedom of religion. The term 'worship' may be defined as religious practice which exhibits prayer, rituals and preaching.<sup>176</sup> The Human Rights Committee has focused on freedom of worship as practised individually and collectively, both inside and outside places designated for worship.<sup>177</sup> It defines the institutional forms of worship as extending 'to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship'.<sup>178</sup> This 'worship' takes place 'either publicly or privately'.<sup>179</sup> The restrictions on worship are brought to light by the Special Rapporteur in his/her reports.<sup>180</sup>

The term 'practice' may thus be defined as that conduct obviously related to a religious conviction. Article 6 of the 1981 UN Declaration on Religious Intolerance enlists various acts including the freedom to establish places of worship. In a relevant case, the European Commission on Human Rights even considered the distribution of leaflets as a practice of

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<sup>173</sup> There are always competing claims between the religious communities and the government over the ownership dispute. In the United States, the government passed the American Indian Religious Freedom Act 1978 to address the needs of American Indian religious communities and this act paved way for enacting more policies which have recognised the importance of Native Indian sacred sites. However, still the indigenous religious communities have not been successful in establishing their right over their sacred sites. PW Edge, *Religion and Law: An Introduction* (Ashgate, Aldershot 2006) 129-31.

<sup>174</sup> Ibid 129.

<sup>175</sup> ICCPR (n 155) art 18(1); 1981 UN Declaration on Religious Intolerance (n 156) art 1(1) and at the regional level, the ECHR (n 29) art 9(1). The four forms are found in different orders.

<sup>176</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 321.

<sup>177</sup> UNGA 'Report of the Human Rights Committee' (1983) UN Doc A/38/40 [74].

<sup>178</sup> UNCHR 'General Comment 22' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.7 [4].

<sup>179</sup> UDHR (n 1) art 18; ICCPR (n 155) art 18; and 1981 Declaration on Religious Intolerance (n 156) art 1.

<sup>180</sup> UNGA 'Report of the Human Rights Committee' (1980) UN Doc A/35/40 [135]; (1984) UN Doc A/39/40 [382]; (1988) UN Doc A/43/40 [304].

belief.<sup>181</sup> 'Observance' means that religious procession, religious clothing,<sup>182</sup> prayers and all other customs and rites. Teaching includes communicating matters related to religion in religious schools which also includes sacred sites, in public schools through religious instruction, by way of non-formal education and through various missionary activities.

Protection of sacred sites may be essential with respect to another important reason known as pilgrimage. Article 1.2 of the model convention covers the right to pilgrimage to sacred sites situated within and outside one's country. Pilgrimage is also a fundamental religious practice throughout the world. For example, in Islam, all Muslims have the obligation to take a *Hajj* pilgrimage to Mecca during their lifetime.<sup>183</sup> In other religions such as Christianity, Hinduism and Buddhism, though it is not obligatory, followers of these religions regularly undertake pilgrimages to sacred sites associated with their religious beliefs. In South Asia, it is a common feature among various religious people, particularly Hindus and Buddhists pilgrims, to travel to shrines to witness places of fundamental importance to their religion.<sup>184</sup> Sometimes, states prevent access to pilgrim sites for discriminatory reasons.<sup>185</sup>

Among the UN initiatives, the right to undertake pilgrimage to sacred sites is first recognised in the Arkot Krishnaswamy Study.<sup>186</sup> In his report, Krishnaswamy states:

When a pilgrimage is an essential part of a faith, any systematic prohibition or curtailment of the possibility for pilgrims to leave their own country or to a foreign country where the

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<sup>181</sup> *Arrowsmith v the United Kingdom* (App no 7050/75) (1978) 3 EHRR 218.

<sup>182</sup> *Singh Bhinder v Canada* Comm no 208/1986 (28 November 1989) UN Doc CCPR/C/37/D/208/1986. In this communication, the author, a Sikh by religion claimed that his right to manifest his religious beliefs (wearing a turban around his head) has been violated by the requirement of Canadian National Railway Company which made him to wear safety headgear during work. However, the Human Rights Committee found that this limitation was justified by reference to the grounds laid down in ICCPR art 18(3).

<sup>183</sup> JE Campo, 'The Mecca Pilgrimage in the Formation of Islam in Modern Egypt' in J Scott and P Simpson-Housley (eds), *Sacred Places and Profane Spaces: Essays in the Geographic's of Judaism, Christianity, and Islam* (Greenwood, London 1991) 145-7.

<sup>184</sup> SM Bhardwaj, *Hindu Places of Pilgrimage in India: A Study in Cultural Geography* (University of California Press, Berkeley 1973) 3.

<sup>185</sup> ER Cohen, *Human Rights in the Israeli-Occupied Territories: 1967-1982* (Manchester University Press, Manchester 1985) 209.

<sup>186</sup> UNCHR (Sub-Commission), 'Study of Discrimination in the Matter of Religious Rights and Practices by Arcot Krishnaswamy' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1.

sacred place is located, would constitute a serious infringement of the right of the individual to manifest his religion or belief.

Mason points out the various attempts made to attain official recognition of the right to make pilgrimages to sacred sites through international agreements.<sup>187</sup> However, this has not been incorporated in the 1981 UN Declaration on Religious Intolerance.<sup>188</sup> Consequently, there is no recognition for the right to pilgrimage in the international human rights treaties hence a right to undertake pilgrimage to sacred sites is included in the proposed model convention.

In South Asia, more than 200 million people belong to the indigenous communities with the majority living in India.<sup>189</sup> They have their own sacred sites and methods of worship. However, the life and sacred sites of these people are under threat due to the developmental projects such as building massive dams, deforestation and developing tourism.<sup>190</sup> Many indigenous communities have become internally displaced people and suffer considerable human right violations. As a result, many have taken up arms as a means of protecting their sacred lands.<sup>191</sup>

Article 1.3 in the model convention declares that 'states shall undertake special measures'. Religion and community are always inseparable in indigenous religions and desecration of sacred sites makes the existence of both impossible and thus shatters their humanity. The special protection to indigenous sacred sites is necessary and it is not against the equality principle.<sup>192</sup> As vulnerable religious communities, the indigenous people have a right to be

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<sup>187</sup> PW Mason, 'Pilgrimage to Religious Shrines: An Essential Element in the Human Right to Freedom of Thought, Conscience and Religion' (1993) 25 Case W Res J Int'l L 619, 639.

<sup>188</sup> 1981 UN Declaration on Religious Intolerance (n 156).

<sup>189</sup> According to 2001 census, India has approximately 85 million (8.2%) tribal/indigenous people.

<<http://www.censusindia.net>> accessed 14 June 2007.

<sup>190</sup> For a detailed study, RN Pati and J Dash, *Tribal and Indigenous People of India: Problems and Prospects* (APH, New Delhi 2002).

<sup>191</sup> 'Naxalism: Biggest Threat to India' *The Times of India* (New Delhi 18 June 2007). Naxalites are an armed group based on Communist principle. The name came from the peasant uprising in Naxalbari village in Darjeeling district of West Bengal in May 1967, and the movement is today a complex web that covers some 15 states of India, and with active links to the Maoists of Nepal. They mainly recruit their cadres from the tribal communities and poor people.

<sup>192</sup> Richard Herz, 'Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights' (1993) 79 Virginia Law Review 691, 704.



treated specially. The Bagota Conference of 1948 adopted the Inter-American Charter of Social Guarantees which states:

In countries where the problem of an indigenous population exists, the necessary measures shall be adopted to give protection and assistance to the Indians, safeguarding their life, liberty and property, preventing their extermination, shielding them from oppression and exploitation, protecting them from want and furnishing them an adequate education.<sup>193</sup>

As a special measure to protect the interests of the indigenous people, the Inter-American Commission on Human Rights approved a Proposed American Declaration on the Rights of the Indigenous Peoples.<sup>194</sup> Various International Labour Organization (ILO) conventions have dealt in detail with the special protection of indigenous people.<sup>195</sup> The United Nations Working Group on Indigenous Populations<sup>196</sup> has drawn up a draft Declaration on the Rights of Indigenous peoples.<sup>197</sup> In the Indian Constitution, it is stated that ‘nothing in this article ... shall prevent the state from making any special provision for the advancement of ... Scheduled Tribes’.<sup>198</sup> This justifies the proposed article to protect the sacred sites of indigenous people with special measures.

Since every article in the model convention begins with the inclusive phrase ‘every religious group’, the draft convention has not specifically delineated an article for protecting minority religious sites. There may not be a violation of human rights to minority religious communities when impartial protection of all sacred sites is provided.

### **5.6.3. Article 2 - Protection of sacred sites is a right of religious groups**

2.1 Every religious group has the right to acquire and own property and to own and administer such property in accordance with law.

2.2 Every religious group has the right to establish, maintain, administer and to make full use of its sacred sites.

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<sup>193</sup> Final Act of the Ninth International Conference, Resolution XXIX, Annals, 129 cited in P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester 2002) 267.

<sup>194</sup> The Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the IACHR in March 1997) 1333<sup>rd</sup> session, 95<sup>th</sup> regular session.

<sup>195</sup> J Rehman, *International Human Rights Law: A Practical Approach* (Pearson, Harlow 2003) 334-37.

<sup>196</sup> ECOSOC ‘Establishment of the Working Group on Indigenous Populations’ Res 1982.34 (7 May 1982).

<sup>197</sup> SJ Anaya, *Indigenous Peoples in International Law* (2<sup>nd</sup> edn OUP, Oxford 2004) 318-27.

<sup>198</sup> Article 15(4) of the Indian Constitution added by the First Amendment Act 1951.

2.3 Every religious organisation shall have the right to register their sacred sites and shall have the independence to create their own organizational rules and internal by-laws, compatible with domestic legislation.

2.4 Every sacred site shall attain legal personality upon its registration by the religious organisations in the corresponding public registry created for this by the government.

2.5 Registration shall be granted to the religious organisation by virtue of an application together with an authentic document containing proof of title to the land or property involved.

2.6 The application for registration shall contain proof of the foundation or establishment of the organization, declaration of religious purpose, denomination and other particulars of identity, rules of procedure, names of representative bodies and the powers of such bodies.

2.7 There shall not be any discrimination in granting registration to any religious groups.

2.8 Registration shall only be cancelled by a commission appointed by the state or compliance of a final court verdict or at the request of its representative body.

2.9 Registered sacred sites shall be entitled to voluntary financial and other contributions from individuals and institutions within the state and from abroad.

2.10 Registered sacred sites shall be protected against unlawful demolition, relocation or compulsory acquisition.

Commentary: Article 2 emphasises the rights of religious groups and the role of religious organisations in legally exercising those rights. As established from above, sacred sites are an essential component of freedom of religion for individuals and communities to manifest therein their faith. Although the right to freedom of religion has an individual dimension, nevertheless, various human rights treaties bring out the collective dimension in exercising this freedom.<sup>199</sup> The collective dimension is apparent when adherents of a particular religion come together as a group to worship and assemble to manifest their faith in a particular sacred site. Many religious practices are fulfilled with fellow religious adherents

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<sup>199</sup> ICCPR (n 155) art 18(1) and ECHR (n 29) 9(1).

such as baptism, funeral services, and Friday prayers, to name a few. One of the important elements of a religious community is their right to establish sacred sites.

Recognition of collective religious liberty may require the granting of legal status to religious communities.<sup>200</sup> This legal right grants power to the religious groups to own and acquire property as a prerequisite for establishing sacred sites. In the *Canea Catholic Church* case,<sup>201</sup> the European Court of Human Rights held that the discriminatory denial of legal personality to some church communities has denied their power to litigate and establish their religious rights. Lekhal suggests that 'legal entity status for religious communities is a prerequisite to genuine freedom of conscience'.<sup>202</sup> In *Hasan and Chaush v Bulgaria*,<sup>203</sup> the Grand Chamber of the ECHR considered that religious communities traditionally and universally exist in the form of organised structures. Despite their legal status, any organisation is a union of individuals. In most religions, an individual member cannot afford to own a sacred site and instead will support a religious organisation which owns and maintains it.<sup>204</sup> This is found in Article 6 of the 1981 UN Declaration on Religious Intolerance which specifies certain freedoms including the right to establish and maintain places and right to establish and maintain appropriate charitable and humanitarian institutions which are mainly the activities of religious organisations.<sup>205</sup>

There is also a cultural component to the formation of religious organisations. A religious adherent may see sharing time and experiences with co-religionists, apart from time spent in manifesting their religion, as part of their religious identity. This has been brought out succinctly by Knott when he observed that the traditions have centres of places of worship

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<sup>200</sup> *Metropolitan Church of Bessarabia v Moldova* (App no 45701/99) (2002) 35 EHRR 306.

<sup>201</sup> *Canea Catholic Church v Greece* (App no 25528/94) (1999) 27 EHRR 521.

<sup>202</sup> A Lekhal, 'Leveling the Playing Field for Religious 'Liberty' in Russia: A Critical Analysis of the 1997 Law 'on Freedom of Conscience and Religious Associations'' (1999) 32 Vand JTL 167, 186.

<sup>203</sup> *Hasan and Chaush v Bulgaria* (App no 30985/96) (2002) 34(6) EHRR 1339. The Court held that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.

<sup>204</sup> PW Edge, *Religion and Law: An Introduction* (Ashgate, Aldershot 2006) 101.

<sup>205</sup> R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (OUP, Oxford 2005) 109.

which are used not only for religious purposes but also for social and cultural occasions.<sup>206</sup> This is especially true in India where Hindu temples and Christian churches are used for social and cultural functions.

Whatever rights religious organisations have are claimed on behalf of their members. The advantage of letting religious organisations exercise their rights is shown when such rights are disputed in the courts. In such a situation religious organisations have the ability to take responsibility to defend the alleged violated rights. In the *Church of Scientology* case, the European Commission held,

When a Church body lodges an application under the Convention, it does so in reality on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members.<sup>207</sup>

The importance of religious organizations is brought out clearly in the *Hasan and Chaush* case<sup>208</sup> where the Court observed:

The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.<sup>209</sup>

The importance of organisations may be felt among members of unpopular or persecuted religious groups to secure their rights, or to provide 'networks and brotherhood, and thus emotional and often financial support'.<sup>210</sup> Thus it becomes necessary to recognise religious organisations and their power to establish and maintain sacred sites on behalf of the religious community they represent. Thus Article 2.7 emphasises that there should not be

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<sup>206</sup> K Knott, 'Other Major Religious Traditions' in T Thomas (ed), *The British: Their Religious Beliefs and Practices 1800-1986* (Routledge, London 1988)148.

<sup>207</sup> *Pastor X and Church of Scientology v Sweden* (App no 7805/77) (1979) 16 DR 68; *ARM Chappell v United Kingdom* (App no 12587/86) (1987) 53 DR 241 and *Finska Forsamlingen i Stockholm and T Hautaniemi v Sweden* (App no 24019/94) (1996) 85-A DR 94.

<sup>208</sup> *Hasan and Chaush v Bulgaria* (App no 30985/96) (2002) 34(6) EHRR 1339.

<sup>209</sup> *Ibid* [62].

<sup>210</sup> B Wilson, 'The Flowering and Deflowering of Protestantism' in P Gee and J Fulton (eds), *Religion and Power: Decline and Growth* (BSA, London 1991) 18.

any discrimination in granting recognition to religious groups who establish, own and maintain sacred sites. The right to non-discrimination is endowed to the religious groups because only the group can defend and protect sacred sites in case of a dispute over them. Moreover, any discrimination on the registration directly affects the community's right to sacred sites.

Another area of state failure is related to recognition of certain religious organisations. The reports from the Special Rapporteur for human rights (previously on religious intolerance) have focused on discrimination by States in granting recognition to religious organisations.<sup>211</sup> The decision in the *Metropolitan Church* case may be considered significant in supporting the need to ensure judicial protection to the religious community, its members and its assets.<sup>212</sup> The HRC has often expressed its concern for minority religious groups<sup>213</sup> and emphasised the need to grant legal recognition on registration.<sup>214</sup> In recent years, the OSCE too has stressed the need to officially recognise the religious communities.<sup>215</sup>

#### **5.6.4. Article 3 - Right to Equal treatment of all sacred sites**

3.1 Every religious group shall have the right to equal treatment to establish, maintain and administer sacred sites without any discrimination.

3.2 For the purpose of the present convention, the expression 'discrimination' shall refer to any unreasonable distinction, exclusion, restriction, imposition of condition, and abolition of the recognition, enjoyment or exercise of the freedom of religion.

3.3 There shall not be any arbitrary interference with respect to the right of religious groups to establish, preserve and protect sacred sites from any state or non-state actors, group of persons or individuals on the ground of religion.

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<sup>211</sup> UNCHR 'Report of the Special Rapporteur on Religious Intolerance' (1996) UN Doc E/CN.4/1997/91 [19](b) (Bulgaria); (1998) UN Doc E/CN.4/1998/6 [58](b) (Russia); (2000) UN Doc A/55/280/Add.1 [157]-[164] (Turkey).

<sup>212</sup> *Metropolitan Church of Bessarabia and Others v Moldova* (App no 45701/99) (2002) 35 EHRR 306 [118].

<sup>213</sup> UNCHR 'General Comment 23' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI GEN.1/Rev.7 [50].

<sup>214</sup> UNGA 'Report of the Human Rights Committee' (1989) UN Doc A/53/40; (1990) UN Doc A/45/40 Vol 1; (2002) UN Doc A/57/40 Vol 1.

<sup>215</sup> ODIHR 'The Human Dimension Seminar on Constitutional, Legal and Administrative Aspects of the Freedom of Religion' Consolidated Summary (16 April 1996)

Commentary: The principles of equal treatment and non-discrimination are fundamental principles of international human rights law. The UDHR observes that ‘all are equal before law and are entitled without any discrimination to equal protection of the law’.<sup>216</sup> This is entrenched in Article 26 of the ICCPR which states ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.<sup>217</sup> The United Nations, from its inception, has given wider importance to eliminating discrimination in every human rights activity. The principle of equality and the prohibition of discrimination are the dominant single theme of the ICCPR.<sup>218</sup> The ECHR does not contain a general right to equality but instead only prohibition of discrimination in Article 14 of the European Convention on Human Rights<sup>219</sup> comparable to article 2(1) of the ICCPR.

Article 3 of the model convention for South Asia is a significant one since there is evidence of discriminatory practices of the government and non-state actors, which is illustrated in the Ayodhya case study. Among the members of the SAARC regional organisation, minority religious groups suffer discrimination and their legal and fundamental rights are often violated. For example, Hindus in Bhutan, Christians and Muslims in India, Christians and Hindus in Bangladesh, Muslims and Christians in Sri Lanka, Ahmadiyas, Hindus and Christians in Pakistan experience discrimination from the governments and from other groups.<sup>220</sup>

For the purpose of this model draft convention, the term ‘discrimination’ is used as given in article 2(2) of the 1981 Declaration on Religious Intolerance. Article 2 delineates the non-

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<sup>216</sup> UDHR (n 1) art 7.

<sup>217</sup> ICCPR (n 155) art 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>218</sup> BG Ramcharan, ‘Equality and Non-discrimination’ in L Henkin (ed), *The International Bill of Rights. The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 246.

<sup>219</sup> ECHR (n 29) art 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>220</sup> SA Mujtaba, ‘South Asia: Predicament and Prospects in the 21<sup>st</sup> Century’ in NK Jha (ed), *South Asia in 21st Century: India, Her Neighbors and the Great Powers* (South Asian, New Delhi 2003) 65.

discrimination in the UN Charter. Article 2(1)<sup>221</sup> refers to discrimination while article 2(2)<sup>222</sup> refers to 'intolerance and discrimination'. From this article it becomes clear that the injunction against religious discrimination covers not only discriminatory acts by states but extends also to any 'institution, group of persons or persons'.<sup>223</sup> In the human rights treaties, equality and non-discrimination principles, in general, apply to individuals. However, as seen earlier, collective religious rights are recognised in various provisions of human rights treaties and as such these principles are applied to collective religious organisations in protecting sacred sites.

At the regional level, the European Court of Human Rights has considered three key questions while dealing with violations of article 14 of the ECHR.<sup>224</sup> They are, firstly, whether the complaint is within the scope of the substantive provisions of the convention;<sup>225</sup> secondly, whether the applicants can properly compare themselves with a class of persons who are treated more favourably;<sup>226</sup> and finally, whether the difference in treatment can be justified.<sup>227</sup> This is very well in tune with the contents of the 1981 UN Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief which prohibits all forms of discrimination and calls state parties to adopt necessary measures to combat discrimination on the ground of religion or belief.<sup>228</sup>

When there is an application complaining of discriminatory treatment, it is the responsibility of the respondent government to prove the 'difference of treatment' was

<sup>221</sup> 1981 Declaration on Religious Intolerance (n 156) art 2(1): No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.

<sup>222</sup> 1981 Declaration on Religious Intolerance (n 156) art 2(2): For the purpose of the present Declaration, the Expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

<sup>223</sup> BG Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Martinus Nijhoff, The Hague 1996) 171.

<sup>224</sup> C Ovey and R White, *Jacobs and White: The European Convention on Human Rights* (4<sup>th</sup> edn OUP, Oxford 2006) 413.

<sup>225</sup> *Haas v The Netherlands* (App no 36983/97) (2004) 39 EHRR 897 [41].

<sup>226</sup> *Marckx v Belgium* (App no 6833/74) (1979) 2 EHRR 330 [32].

<sup>227</sup> *Frette v France* (App no 36515/97) (2004) 38 EHRR 438 [34]. In this case, the Court stated: a difference in treatment is discriminatory for the purpose of Article 14 if it 'has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.

<sup>228</sup> 1981 Declaration on Religious Intolerance (n 156) art 2, 3 and 4.

necessary to pursue a legitimate aim. In the *Lithgow* case, the European Court held ‘for the purposes of Article 14, a difference of treatment is discriminatory if it ‘has no objective or reasonable justification’, that is, if it does not pursue a legitimate aim’.<sup>229</sup> The European Court has allowed the contracting states a certain margin of appreciation while considering the cases of different treatment in law though it will vary according to the circumstances, the subject matter and its background.<sup>230</sup> The European Court accepts the state’s margin of appreciation in deciding whether a particular interference is necessary in a democratic society. It is apparent from its observation in the *Handyside* case, where the court held that by reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.<sup>231</sup>

Article 3(2) in the model convention prohibits any ‘arbitrary interference’ with the right to establish, preserve and protect sacred sites. The inclusion of the term ‘interference’ is important since states, non-state actors and other groups often interfere in manifesting one’s right to freedom of religion. In the *Metropolitan Church of Bessarabia and others* case, the European Court held ‘... the right of believers to freedom of religion, which includes the right to manifest one’s religion collectively, presupposes that believers may associate freely, without arbitrary interference by the state’.<sup>232</sup> However, Taylor observes that ‘the criteria for assessing whether there has been state interference with the manifestation of religion or belief are not unduly rigid, at both European and universal level’.<sup>233</sup>

Any interference from the state or non-state actors with the proposed right to establish and to protect sacred sites will be considered a violation of fundamental right to freedom of religion and states may be held accountable in their failure to ensure protection of the above

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<sup>229</sup> *Lithgow and others v United Kingdom* (App no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81) (1986) Series A no 102; 8 EHRR 329 [177].

<sup>230</sup> *Inze v Austria* (App no 8695/79) (1987) 10 EHRR 394 [41].

<sup>231</sup> *Handyside v United Kingdom* (App no 5493/72) (1976) 1 EHRR 737 [48]; *Gillow v United Kingdom* (App no 9063/80) (1986) Series A no 109; 11 EHRR 355 [56]. The Court held that the Guernsey legislature is better placed than the international judge to assess the effects of any relaxation of the housing controls.

<sup>232</sup> *Metropolitan Church of Bessarabia and others v Moldova* (App no 45701/99) (2002) 35 EHRR 306 [118].

<sup>233</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 222.



mentioned right. The above analysis shows that international human rights law clearly prohibits any discriminatory practices from the state or its local authorities in denying recognition to the religious communities and they are necessary in a pluralistic society to maintain peace and public order.

#### **5.6.5. Article 4 - Legal limitations in protecting sacred sites**

4.1 The right to establish, maintain and administer sacred sites may be subject only to such limitations prescribed by law and/or are necessary to protect public order, health, morals and the fundamental rights and freedoms of others.

4.2 The right of religious groups to establish, maintain and administer sacred sites shall be subjected to state restrictions necessary on the grounds of planning requirements and registration policies, and regulatory provisions. However, such policies and regulations shall be formulated and implemented with due respect to preserve and to allow coexistence of all sacred sites without any discrimination.

The limitation provisions contained in the model convention are mostly based on the UDHR,<sup>234</sup> the ICCPR,<sup>235</sup> the 1981 UN Declaration on Religious Intolerance and Article 9(2) of the ECHR.<sup>236</sup> The term 'limitation' is a relative term whose application may vary according to different times and cases. In addition this term implicates states, groups and individuals. The justification for limitations arises owing to the need to balance the interest of the community against the interests of the individuals.<sup>237</sup>

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<sup>234</sup> UDHR (n 1) art 29(2): In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the right and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.

<sup>235</sup> ICCPR (n 155) art 18(3): Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

<sup>236</sup> 1981 UN Declaration on Religious Intolerance (n 156) art 1(3): Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order health or morals or the fundamental rights and freedoms of others.

<sup>237</sup> A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671, 695. McHarg observes that the relationship between human rights and public interest exceptions is one of the most important issues in contemporary human rights jurisprudence.

Article 18(3) of the ICCPR sets out the limitation clauses which are applicable only in manifestation of one's right to freedom of religion. From Article 18(3), it is apparent that restrictions or limitations are possible only with regard to the active, public freedom of religion.<sup>238</sup> The structure is similar to the other provisions, such as Articles 12(3), 19(3), 21 and 22(2), of the ICCPR. As with most comparable provisions, limitations under Article 18(3) must fulfil two conditions, namely, the state action must be 'prescribed by law'<sup>239</sup> and 'necessary' to achieve the stated aims. The grounds of limitations include public order, health, morals and fundamental freedoms and rights of others.<sup>240</sup>

The specification of limitations becomes necessary on account of enforcement organs to implement the rights without violating them. In the ECHR, there are two basic principles concerning the limitations on the right guaranteed. In *The Sunday Times Case*,<sup>241</sup> the European Court of Human Rights acknowledged these two prerequisites. They are, firstly, the law in question must be adequately accessible, and secondly, it must be formulated with sufficient precision that the consequences of a given action are foreseeable.<sup>242</sup> In many countries, the excessive discretionary power of executives may act against non-state religions and denominations.

The word 'necessary' refers to attainment of any of the purposes listed in the Article. The obligation of necessity shows that the limitation must be proportional in protecting the aims for which it is imposed and it may not become a rule. The court, if it is satisfied that any limitation has a legal basis which meets the requirements of 'law' under the ECHR provisions, will consider whether the limitation is necessary to protect one of the specified legitimate aims.<sup>243</sup> For instance, Article 9(2) of the ECHR mentions 'democratic society' as

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<sup>238</sup> KJ Partsch, 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 212.

<sup>239</sup> UDHR (n 1) art 29(2) states 'determined by law'; ICCPR (n 155) art 18(3) and 1981 Declaration on Religious Intolerance (n 156) art 1(3) state 'prescribed by law'.

<sup>240</sup> For a detailed analysis on limitation provisions, see, A Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Martinus Nijhoff, The Hague 1998).

<sup>241</sup> *The Sunday Times v United Kingdom* (App no 6538/74) (1979) Series A no 30 (1979-80) 2 ECHR 245 [48].

<sup>242</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (CUP, Cambridge 2005) 294.

<sup>243</sup> *Ibid* 307-8.

one of the important aims.<sup>244</sup> The concept of ‘a common democratic standard’<sup>245</sup> cannot be enforced as an absolute rule, but in any particular situation where the needs of a democratic society are balanced against individual or group rights to freedom of religion, the balance must be struck in terms of proportionality.

The model convention in Article 4.1 narrates four grounds for limitations. They are ‘to protect public order, health, morals and the fundamental freedoms and rights of others’. The term public order is imprecise and has to take account of the different time, place and circumstances where public order issue takes place. Public order must be consistent with the principles and values of a given society thereby meeting the social criteria of the state. The ICCPR uses the term ‘*ordre public*’ (meaning ‘public order’) in other Articles as a general term to limit the rights guaranteed in the Covenant but in Article 18(3) the term ‘*l’ordre*’ (meaning ‘order’) is used to narrow the meaning when referring to public order limitation. This is a significant difference. It means that right to freedom of religion may not be limited for all of the reasons arising to protect public order but only such acts which disturb the order.<sup>246</sup>

The limitation ‘public order’ also appears in Article 9(2) in the ECHR. However, the case law on Article 9(2) is not consistent with the narrow sense given to the phrase ‘public order’ in other contexts.<sup>247</sup> Article 9(2) of the ECHR refers to ‘the protection of public order’ whereas other provisions such as Articles 8(2), 10(2), and 11(2) use the term ‘the prevention of disorder’. This difference was clarified by the European Court of Human Rights in the *Engel* case where it stated that ‘disorder’ covers not only ‘public order’ but also covers the order that must prevail within the confines of a special social group.<sup>248</sup>

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<sup>244</sup> *Kokkinakis v Greece* (App no 14307/88) (1993) Series A no 260-A; 17 EHRR 397 [31].

<sup>245</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 325.

<sup>246</sup> KJ Partsch, ‘Freedom of Conscience and Expression, and Political Freedoms’ in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 212.

<sup>247</sup> For example, the European Commission on Human Rights accepted the prohibition placed on a Buddhist prisoner from growing a beard and the refusal to provide a prisoner with meals corresponding to his religious beliefs. Peter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3<sup>rd</sup> edn Kluwer Law International, The Hague 1998) 556.

<sup>248</sup> *Engel v Netherlands* (App no 5100/71; 5101/71; 5102/71; 5354 72; 5370 72) (1976) Series A no 22[98].

Based on this ruling of the European Court, it may be observed that ‘public order’ in article 9(2) refers to only the concept of ‘order in places accessible to everyone’.<sup>249</sup>

The second limitation based on health is found in many provisions in the Covenant. Conflicts may occur when a state makes a health measure compulsory in protecting public health and which may be contrary to the religious convictions of a religious community. For instance, the Jehovah’s Witnesses refuse all blood transfusions, even if it is the last measure to protect a life.

The third ground for limitation is to protect morals in the state. The term, morals, may be defined as a set of principles, which may not be always legally enforceable. The case law of the European Court of Human Rights indicate that it is not possible to find a uniform European notion of morals.<sup>250</sup> However, those principles are widely accepted by a majority of citizens for their individual and collective behaviour in a society and as such the state enjoys a wide margin of appreciation in enforcing limitations on the ground of protecting morals.<sup>251</sup> The case law suggests that ‘the protection of morals’ is usually associated with sexual morality.<sup>252</sup> This limitation is necessary for South Asia where some temples were used for activities such as temple prostitution.

The fourth ground for enforcing limitation is to protect fundamental rights and freedoms of others in the society. It is significant to note that unlike other provisions in the ICCPR, Article 18(3) does not authorize limitations for the protection of general rights and freedoms but rather only the ‘fundamental rights and freedoms of others’. Nowak observes that this difference from ‘general human rights’ to ‘fundamental human rights’ points

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<sup>249</sup> P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3<sup>rd</sup> edn Kluwer Law International, The Hague 1998) 554.

<sup>250</sup> AC Kiss, ‘Permissible Limitations on Rights’ in L Henkin (ed), *The International Bill of Rights, The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 304. The decision of the European Court in the *Handyside* case is particularly relevant here. *Handyside v United Kingdom* (App no 5493/72) (1976) Series A no 24 (1976) 1 EHRR 737.

<sup>251</sup> *Wingrove v United Kingdom* (App no 17419/90) (1997) 24 EHRR 1 [58]; *Otto-Preminger-Institute v Austria* (App no 13470/87) (1994) Series A no 295-A [35].

<sup>252</sup> *Handyside v United Kingdom* (App no 5493/72) (1976) 1 EHRR 737; *Muller and Others v Switzerland* (App no 10737/84) (1988) Series A No 133 (1991) 13 EHRR 212; and *Dudgeon v United Kingdom* (App no 7525/76) (1981) Series A No 45 (1982) 4 EHRR 149.

toward some substantive rights which enjoy special remedies in the national law (especially a constitution).<sup>253</sup> For instance, in India, if fundamental rights guaranteed in Articles 14 to 30 are violated, the victims have the right to approach the High Court or the Supreme Court through various Writ petitions to obtain remedy.<sup>254</sup> Since many fundamental human rights are set out in two UN human rights Covenants, ICCPR and ICESCR, the freedom of religion may be limited to protect one of the fundamental rights of others guaranteed in those covenants, hence it has an international dimension. For example, manifestation of freedom of religion may be curtailed by a state if a sacred site is used to advocate racial hatred, since it violates the prohibition of discrimination under article 26 of the ICCPR. In the 1981 UN Declaration on Religious Intolerance, the only reference to ‘the fundamental rights and freedoms of others’ is in Article 1 (3) which is similar to Article 18 of the ICCPR. .

The ECHR refers to ‘the rights and freedoms of others’ in Article 9. In *Kokkinakis v Greece*,<sup>255</sup> the European Court observed the need to place restrictions on Article 9 in order to reconcile the interests of the various groups and to ensure everyone’s beliefs are respected. In another case, the court upheld the decision of the Austrian court that the showing of a film was considered to violate the right to respect for religious feelings.<sup>256</sup> In the *Leyla Sahin* case,<sup>257</sup> the court accepted the view of the Turkish state and observed that where several religions coexist in a state, it may be deemed necessary to place restrictions on the manifestation of religious beliefs to protect the interests of different religious groups and to ensure everyone’s right to freedom of religion is respected.

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<sup>253</sup> M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl 1993) 329.

<sup>254</sup> PM Bakshi, *The Constitution of India* (5<sup>th</sup> edn Universal law Publishing Co, Delhi 2002) 74-82.

<sup>255</sup> (1993) Series A no 260-A.

<sup>256</sup> *Otto-Preminger Institute v Austria* *Otto-Preminger-Institute v Austria* (App no 13470 87) (1994) Series A no 295-A. The applicant institute tried to show a film that offended the Catholic religion and the religious feelings of the people of Tyrol, a region that consists of a large majority of Catholics in whose lives religion plays a very important role. The authorities had banned the showing of the film in an art cinema and confiscated the film.

<sup>257</sup> *Leyla Sahin v Turkey* (App no 44774/98) Judgment of 29 June 2004. This case has been referred to the Grand Chamber and it found there was no violation of article 9. Judgment dated 10 November 2005.

Another way of limiting the manifestation of religion is by non recognition of a religious group by the state. For instance, in the *Metropolitan Church of Bessarabia* case,<sup>258</sup> Moldova's refusal to recognise the church was held to have curtailed the community's right to manifest its religion.<sup>259</sup> In the same manner in *Manoussakis*,<sup>260</sup> the court indicated that intervention in the procedure for authorization of the established church could not be reconciled with the provisions in Article 9 (2). In *Vergos v Greece*, the court observed that a specific system for authorisation of the use of premises for religious purposes must be distinct or differentiated from more generally applicable legal provisions concerning planning consent which may be easier to curb the religious freedom.<sup>261</sup>

#### 5.6.6. Article 5 - Remedies

5.1 All decisions by the state on demolition, re-location or denial of planning permission shall be guided by the principles of transparency, fairness and impartiality. The decisions shall be subject to judicial supervision.

5.2 Defilement, destruction or damage to sacred sites shall be treated as a criminal offence, a cultural crime against humanity, and any individual who commits such an offence shall be punished in accordance with the domestic law of the state where the offence was committed.

5.3 Any individual or public official who aids and abets the above offences shall be punished in accordance with the domestic law of the state where the offence was committed.

5.4 When a state fails to punish those individuals or groups involved in attacks over sacred sites, they shall be subjected to regional court when such acts lead to egregious violations of human rights.

5.5 Sacred sites illegally damaged or destroyed shall be repaired or rebuilt at the same site or at a suitable alternative site at the expense of the individuals or groups responsible for such crime, but if circumstances arise where this is not

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<sup>258</sup> *Metropolitan Church of Bessarabia v Moldova* (App no 45701/99) (2002) 35 EHRR 306.

<sup>259</sup> Ibid [118]. In this case, the Court observed that 'since religious communities traditionally exist in the form of organised structures, article 9 must be interpreted in the light of article 11 of the Convention, which safeguards associative life against unjustified State interference'.

<sup>260</sup> *Manoussakis and Others v Greece* (App no 18748/91) (1997) 23 EHRR 387.

<sup>261</sup> *Vergos v Greece* (App no 65501/01) Judgment of 24 June 2004.

feasible, the state authorities shall be responsible for rebuilding those sacred sites, especially when the state fails in its obligation to protect these sites.

Commentary: The right to an effective remedy is a key principle of international human rights law. Such remedies can help to ensure compliance with human rights obligations. As Dinah Shelton observes, ‘appropriate remedies can have a dissuasive effect on those who would commit violations ... and thus a significant aspect of ensuring the rule of law’.<sup>262</sup> The right to remedy itself is a right granted by key global and regional human rights instruments. As such, a wrongdoing state has the primary responsibility to rectify the violation and afford redress to the victim. International human rights law provides a framework to get redress to obvious violations when a state has failed to provide the required relief.

The UDHR<sup>263</sup> sets out the right to remedy in Article 8. The ICCPR has an obligation for the state parties to ensure that remedy shall be granted ‘notwithstanding that the violation has been committed by persons acting in an official capacity’.<sup>264</sup> Although the nature of remedies is not delineated in the ICCPR, Schachter’s list of appropriate remedies include undoing, repairing and compensating for violation.<sup>265</sup> Significantly, the Convention on the Elimination of Racial Discrimination contains broad guarantees of effective remedy. Article 6 states:

State parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions against any acts of racial discrimination ... as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>266</sup>

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<sup>262</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup> edn OUP, Oxford 2005) 114.

<sup>263</sup> UDHR (n 1) art 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.

<sup>264</sup> ICCPR (n 155) art 2(3).

<sup>265</sup> O Schachter, ‘The Obligation to Implement the Covenant in Domestic Law’ in L Henkin (ed), *The International Bill of Rights. The Covenant on Civil and Political Rights* (Columbia University Press, New York 1981) 325.

<sup>266</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 6.

Other international treaties include the Convention on the Elimination of All Forms of Discrimination against Women,<sup>267</sup> the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment,<sup>268</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,<sup>269</sup> several provisions of the Convention on the Migrant Workers,<sup>270</sup> and several treaties adopted by the specialized agencies<sup>271</sup>. In addition, the HRC adopted General Comment 31 on Article 2 of the ICCPR on 21 April 2004. It imposes both positive and negative obligation on states including an obligation to provide redress for violations by private parties as well as state agents.<sup>272</sup>

At regional level, this right to an effective remedy is guaranteed in Article 13 of the ECHR.<sup>273</sup> However, Article 13 offers a measure of respect for national procedural autonomy. This refers to the ability of each contracting state to determine the form of remedies offered to meet its obligations under the article. The right to remedy is closely linked with the requirement that domestic remedies be exhausted before an individual has recourse to the ECHR. This highlights the primary role of national institutions and the subsidiary function of the regional court.<sup>274</sup> The European Court held in the *Klass*<sup>275</sup> case that right to remedy is an independent provision which can be violated even if there is no violation of another right granted by the ECHR.

<sup>267</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (1980) 19 ILM 33 (CEDAW) art 2(c).

<sup>268</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) (1984) 23 ILM 1027 (Convention against Torture) art 14.

<sup>269</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000 UNGA Res 263) UN Doc A/Res/54/263.

<sup>270</sup> Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990 UNGA Res 45/158, entered into force 1 July 2003) (Convention on Migrant Workers) art 15, 16(9), 18(6) and 83.

<sup>271</sup> For instance, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989 ILO no 169, entered into force 5 September 1991) 72 ILO Bulletin 59 (1989) 28 ILM 1382.

<sup>272</sup> UNCHR 'General Comment 31' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) HRI/GEN/1/Rev.7 [192].

<sup>273</sup> ECHR (n 28) art 13: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>274</sup> *Akdivar v Turkey* (App no 21893/93) (1997) 23 EHRR 143.

<sup>275</sup> *Klass and others v Germany* (1978) Series A no 28 (1979-80) 2 EHRR 214 [63].



In the Inter-American system, Article XVII of the American Declaration of the Rights and Duties of Man guarantees every person the right to approach courts to ensure legal rights and protection from any violation of fundamental constitutional rights by the authorities of a state. Similarly, the American Convention on Human Rights insists that the state parties ensure that the competent authorities enforce the remedies granted<sup>276</sup> and to guarantee the free and full exercise of all rights granted by the convention.<sup>277</sup> The African Charter also has several provisions, and particularly, Article 21 is significant which refers to 'the right to adequate compensation'.<sup>278</sup>

Most often attacks upon sacred sites are committed by other religious groups, non-state actors and individuals. Consequently, Article 5.4 of this proposed Model Convention focuses on the liability of individuals or non-state actors for their crimes and on bringing them to justice in the proposed regional court. However, human rights treaties, in general, have been drafted in terms of state obligations and duties of non-state actors are seldom mentioned. In many disputes, such as Ayodhya, the rights guaranteed by these treaties are violated by individuals and non-state actors. The question arises whether there are enough provisions under international human rights law for individuals and non-state actors to be held accountable for their violation of human rights.

International protection of human rights is primarily designed to protect human beings against their own state and as such could be seen as a supplementary line of defence in case national systems fail.<sup>279</sup> All civil and political rights granted in the international human rights treaties are intended to be directly invoked by individuals and the state parties by signing these treaties undertake that they will protect and promote these rights within their jurisdiction. For instance, the ECHR declares that the states parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.<sup>280</sup>

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<sup>276</sup> ACHR (n 55) art 25.

<sup>277</sup> ACHR (n 55) art 1(1).

<sup>278</sup> African Charter (72) art 21.

<sup>279</sup> C Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, Oxford 2003) 84.

<sup>280</sup> European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art.1.

However, bringing individuals and groups to criminal trial has a precedent in international criminal law and this has long been recognised for crimes such as war crimes, genocide,<sup>281</sup> and crimes against humanity<sup>282</sup>. The Statute of the International Criminal Court sets out the crimes over which the court has jurisdiction and gives the court jurisdiction to try individuals for serious violations of human rights.<sup>283</sup> The subject matter of international criminal law deals with the liability of individuals irrespective of whether or not they are agents of a state.

Failure to punish those individuals and groups who are involved in crimes against humanity results in victims taking the law into their own hands, both to exact retribution and to draw attention to the denied historical fact. Nothing emboldens a criminal so much as the knowledge that he can get away with a crime.<sup>284</sup> If nothing is done to remedy the injustice, it festers. Moreover, there are some notable merits in bringing the offenders to justice, namely that individual responsibility is established through trials; justice dissipates the call for revenge from victims; and a fully reliable record of atrocities is established.<sup>285</sup>

In the above sense, a criminal prosecution to establish justice is vital. Justice is also one of various means of achieving peace. Moreover, leaving criminals at large precludes the establishment of the rule of law and democracy in many states. Until the persons responsible for crimes are brought to book, ethnic and nationalistic hatred, the desire for revenge and the seeds for armed violence will survive and threaten internal and international peace. Cassese argues that one of the most civilised and constructive response to all these threats lies precisely in the dispensation of truly international, truly impartial and truly fair justice.<sup>286</sup>

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<sup>281</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948 entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art 6.

<sup>282</sup> Statute of the International Criminal Court (adopted 17 July 1998 Rome) UN Doc A/CONF.183/9 (1998)17 ILM 999.

<sup>283</sup> L Mekhemar, 'The Status of the Individual in the Status of the International Criminal Court' in M Politi and G Nesi (eds), *The Rome Statute of the International Criminal Court* (Ashgate, Aldershot 2001) 125.

<sup>284</sup> David Matas, 'Prosecuting Crimes against Humanity: The Lessons of World War I' (1990) 13 Fordham International Law Journal 86, 104.

<sup>285</sup> A Cassese, 'Reflections on International Criminal Justice' (1998) 61 The Modern Law Review 1, 6.

<sup>286</sup> A Cassese, 'Reflections on International Criminal Justice' (1998) 61 The Modern Law Review 1, 10.

Traditionally, State responsibility under international law is separated from the legal responsibility of the individual which is a matter of national, not international law. Moreover, remedies fall on the state, not on individuals whose acts triggered state responsibility. However, this invisibility of the individual in the traditional law of state responsibility did have a drawback. Lauerpacht observes that there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.<sup>287</sup>

Currently, a large number of criminal law treaties, prosecutions of individuals in national and international courts and the establishment of International Criminal Court have taken individuals away from behind the shield of the state.<sup>288</sup> International law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and now confronts individuals directly with the legal consequences of their acts.<sup>289</sup> The question may arise whether taking the offenders to the regional court will amount to double jeopardy which is a widely accepted principle in criminal law. This may not amount to the violation of double jeopardy principle because there are certain exceptions given in Article 20 of the ICC statute which includes cases where the national court proceedings were not independent or impartial; where the original trial was an artifice for the prevention of an international criminal trial; or where the case was not prosecuted diligently.<sup>290</sup>

It may also be noted that a civil remedy alone is not enough and would not excuse the failure of the state to prosecute the offenders. Punishment serves as a deterrence for future

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<sup>287</sup> H Lauterpacht, *International Law and Human Rights* (Archon Books, Hamden 1968) 40.

<sup>288</sup> Andre Nollkeemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 ICLQ 615, 618. For instance, the Nuremberg International Military Tribunal observed, 'Crimes against international law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.

<sup>289</sup> C Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Right harms' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford 2001) 45.

<sup>290</sup> Claire de Than and E Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell, London 2003) 6.

occurrences of similar crimes against a religious community.<sup>291</sup> In addition, punishing those individuals or groups will prevent future attacks over sacred sites.

A further point to consider is that the role of a state when a complaint is filed in the regional court against individual or non-state actors. It is very difficult to apply elements of criminal liability such as *mens rea* to a state. There is also the problem of punishment. However, in international criminal law, certain acts can lead both to state responsibility and individual responsibility. For instance, after the Second World War, both Germany and Japan were declared liable even though the political and military leaders were assumed to agents of crimes. Moreover, in *Prosecutor v Furundzija*, the ICTY said: 'Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers'.<sup>292</sup>

For this proposed Model Convention, when a state government is found to be actively involved in attacks over sacred sites, the members of such a government will also be included along with other offenders. States also will be a party to the suit since the responsibility of implementing the verdict from the proposed regional court is upon them.

Having established the need for an effective remedy, it is necessary to consider appropriate enforcement mechanisms.

#### **5.6.7. Article 6 - Enforcement mechanisms**

National level:

6.1 Every state party to the present convention undertakes to respect and to ensure the right to protection of sacred sites to all individuals and to all religious groups within its territory through appropriate means including legislation and administrative measures.

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<sup>291</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 20-22.

<sup>292</sup> *Prosecutor v Furundzija* Judgement of 10 December 1998, 38 ILM 317 [142].

6.2 There shall be a Commission in every participant state and membership shall include equal number of members of government officials and representatives of religious communities in the country.

6.3 The functions of the Commission shall include making proposals to the government to implement the provisions of the convention, reporting of all events in the state, reviewing situations, and trying reconciliatory measures among various disputing religious or other groups.

Regional level:

6.4 To ensure the observance of the activities undertaken by the contracting parties to the convention, there shall be a permanent regional court in the South Asian region.

6.5 The court shall have jurisdiction concerning interpretation and application of the convention in protecting sacred sites.

6.6 Any contracting party may refer to the court any alleged breach of the provisions of the convention by another contracting party.

6.7 The court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the contracting parties of the rights set forth in the convention.

6.8 The SAARC shall appoint a High Commissioner for protection of sacred sites to identify and seek early resolution of religious disputes that might endanger peace, stability or friendly relations between SAARC participating states.

Commentary: A human rights system consists of a list or lists of internationally guaranteed human rights, permanent institutions, and enforcement procedures.<sup>293</sup> As such, Article 6 in the model convention contains enforcement mechanisms for the protection of sacred sites and it proposes two levels of enforcement mechanisms.

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<sup>293</sup> D Shelton, 'The Promise of Regional Human Rights System' in BH Western and SP Marks (eds), *The Future of International Human Rights* (Transnational, New York 1999) 352.

To protect and promote human rights, there are many supervisory procedures which address gross and systematic violations. The UN Charter based mechanism, the Human Rights Council, previously known as the United Nations Commission on Human Rights, accepts complaints about human rights abuses. ILO and UNESCO have developed their own human rights complaint procedures. These bodies require that local remedies have been exhausted before they approach the above-mentioned international institutions. Among human rights treaty bodies, the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture may receive petitions within their jurisdictional limits. These international supervisory bodies are generally an independent committee or commission which undertakes fact-finding and attempts to achieve a friendly settlement of admissible complaints. The process culminates with the preparation of a report which may declare a violation has occurred and recommend some remedies.<sup>294</sup> However, it should be noted that these bodies are non-judicial bodies.

Regional human rights systems in Europe, the Americas, and Africa allow petitions to be filed after all local remedies have been exhausted. Regionally, a case is heard by a competent permanent international court and issue binding decisions often including remedies. Regional human rights system are analysed in section 5.2 of this chapter.

After the Second World War, the call for punishing those who are responsible for human rights abuses during war resulted in establishing the Charter of the International Military Tribunal (IMT) which was adopted on 8 August 1945. In December 1945, the four allied powers enacted Control Council Law No. 10 which gave the legal source for a series of trials.<sup>295</sup> Subsequently various efforts at UN level led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in the General Assembly in 1948.<sup>296</sup> Article VI of the Genocide Convention<sup>297</sup> mentioned about the need of an international penal tribunal for the trial for crimes of genocide. Hence, the UN General

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<sup>294</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup> edn OUP, Oxford 2005) 177-78.

<sup>295</sup> WA Schabas, *An Introduction to the International Criminal Court* (2<sup>nd</sup> edn CUP, Cambridge 2004) 6.

<sup>296</sup> Genocide Convention (n 277).

<sup>297</sup> Genocide Convention (n 277) art VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Assembly adopted a resolution<sup>298</sup> to request the International Law Commission (ILC)<sup>299</sup> to prepare the statute of the court envisaged by Article VI. After a lengthy process, the ILC submitted its final version of its draft for an international criminal court draft code to the General Assembly in 1994.<sup>300</sup> Also, the ILC adopted the final draft of its 'Code of Crimes against the Peace and Security of Mankind'<sup>301</sup> which defined the crimes and related legal principles to the code of crimes.

Meanwhile the atrocities committed in Yugoslavia necessitated the establishment of an international criminal tribunal to prosecute persons responsible for serious human rights abuses. In 1993, the UN Secretary-General proposed a draft which was adopted by the Security Council and an ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) was established.<sup>302</sup> Again in 1994, the Security Council, on the basis of a request from Rwanda, created a second ad hoc tribunal to try the charges of genocide and other serious violations of human rights and violation of international humanitarian law in Rwanda.<sup>303</sup> These two ad hoc tribunals played a vital role in enhancing the efforts of the International Criminal Court (ICC) and set a legal precedent for the drafters of the ICC statute. For instance, many rulings found a place in the statute of the ICC. Significantly, one ruling observed that crimes against humanity could be committed in times of peace and not just in wartime.<sup>304</sup>

From 1994, the UN General Assembly accelerated its efforts towards the establishment of the ICC and formed an *Ad Hoc* Committee. On 17 July 1998, the Statute of the ICC was adopted in the Rome Diplomatic Conference of Plenipotentiaries on the Establishment of

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<sup>298</sup> UNGA Resolution 260B (III) 9 December 1948 'Study by the International Law Commission of the Question of an International Jurisdiction'.

<sup>299</sup> International Law Commission is a group of experts selected by the United Nations General Assembly to codify international law. <<http://www.un.org/law/ilc/>> accessed 15 May 2006.

<sup>300</sup> UNGA 'Report of the International Law Commission on the Work of its Forty-Sixth Session' (2 May-22 July 1994) UN Doc A/49/10 ch II [23]-[41].

<sup>301</sup> J Allain and John RWD Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind' (1997) 8 EJIL 100.

<<http://www.ejil.org/journal/Vol8/No1/art6.pdf>> accessed 23 September 2006.

<sup>302</sup> UNSC Res 827 (8 May 1993) UN Doc S/RES/827.

<sup>303</sup> UNSC Res 955 (8 November 1994).

<sup>304</sup> *Prosecutor v Tadic* (Case No IT-94-1-AR72, Decisions on the Defense Motion for Interlocutory Appeal on Jurisdiction 2 October 1995 (1997) 105 ILR 453, 35 ILM 32.

an International Criminal Court.<sup>305</sup> Although many major powers such as the United States, China and India have still not extended their cooperation to the ICC, it is perhaps a significant development in international law. The creation of the ICC highlights the fact that human rights protection has taken centre-stage in the UN system.<sup>306</sup> It should be also mentioned that the ICC is an independent, global legal personality.<sup>307</sup>

From the establishment of the ICC, individual criminal liability came under its jurisdiction to try individuals for listed international crimes such as genocide, war crimes and crimes against humanity. The aim of international criminal justice is essentially to prevent crime and help restore international peace and security by punishing those responsible for international crimes. The analysis of growth of international criminal law emphasises that the impartial trial and punishment of criminals is significant to the rule of law.<sup>308</sup> The model convention proposes a regional human rights court to prevent any disputes at an early stage and to act as an impartial body to afford redress to the victims of the sacred sites disputes from all over the region.

The model convention recommends the establishment of a commission at national level. The constitution of the recommended commission may include representatives of state officials and religious communities. However, there may be a problem in a state which has many religions including hundreds of sub-sects or denominations. Hence selection of members for the commission shall be the responsibility of the elected government of a concerned state.

The role of the commission is delineated in Article 6.2 of the model convention. In short, the commission should function as a para-legal body in implementing the rights granted in

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<sup>305</sup> The statute entered into force on 1 July 2002.

<sup>306</sup> Article 1 of the International Criminal Court Statute: An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

<sup>307</sup> R Cryer and Nigel D White, 'The Security Council and the International Criminal Court: Who's Feeling Threatened?' in O Bekou and R Cryer (eds) *The International Court* (Ashgate, Aldershot 2004) 503.

<sup>308</sup> D Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational, New York 2000) xi.



the convention. However, their role in establishing a peaceful pluralistic society is vital in settling the religious disputes amicably. This may be achieved through efforts such as human rights awareness campaigns, publications, devising reconciliatory measures among disputing groups. This may assist in establishing a strong civil society in every state based on democratic values which is a necessity for maintaining peace and security in South Asia.

Article 6.3 recommends a regional human rights court. However, it would be recalled that the region is yet to have a human rights organisation or a regional human rights treaty. Hence, the establishment of a South Asian regional human rights court would be an achievement in the region as a first step to promote and protect human rights. The European regional system was the first to create a regional court for the protection of human rights. Now the other two regions, Inter-American and African (created in 2006 and yet to function)<sup>309</sup> have established regional human rights courts although the latter is not as effective as the European Court of Human Rights.

Creating a human rights court to protect sacred sites could help to reduce many tensions arising out of religious disputes. The court would have the power to receive complaints from individuals, groups and non-governmental organisations apart from state parties. Since protection of sacred sites is an individual as well as a collective right, the religious groups may have the right to establish and the right to claim remedy when the sacred sites are attacked. Many minority religious communities may not have enough resources and strength to approach a regional level court and in such situations, the non-governmental organisations should have the right to approach the court on behalf of the victimised religious community.

One of the important provisions in the model convention is the proposal of appointing a SAARC High Commissioner for the protection of sacred sites. This follows the model of the High Commissioner for National Minorities (HCNM) established by the OSCE. The primary responsibility of HCNM is conflict prevention and he/she is appointed for a period

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<sup>309</sup> See n 77, below.

of three years, which is renewable.<sup>310</sup> Since his/her appointment, the HCNM has been instrumental in reducing ethnic, racial and religious tensions in many parts of Europe. Similarly, the SAARC High Commissioner will engage in religious dispute resolutions through on-site visits. The High Commissioner's reports may assist the proposed SAARC human rights court in settling disputes among states or among religious communities. Nevertheless, the reports of the High Commissioner and his/her recommendations could be used to settle disputes among SAARC nations and this will promote the aims of SAARC. Moreover, the commissioner could be useful to follow up on judgments of the court.

The Article does not mention the jurisdiction of the International Criminal Court (ICC) in punishing those who commit cultural crimes against humanity by attacking sacred sites, since apart from Bangladesh, no other country in the region has ratified the ICC treaty. If the jurisdiction of the ICC is included, that could deter states from signing and ratifying this model convention. Moreover, the ICC has adopted the principle of complementarity as an essential component which means the ICC can take part in cases where domestic trial procedures are unavailable or ineffective. Given that the judiciary fails to function in an impartial manner in many South Asian countries, this complementarity principle becomes 'a wide-open escape clause'.<sup>311</sup>

#### **5.6.8. Article 7 - Ratification of the convention**

7.1 This convention shall be open to the signature of the members of the SAARC and shall be ratified. Ratifications shall be deposited with the Secretary General of the SAARC.

7.2 The present convention shall come into force after the deposit of five instruments of ratification.

7.3 As regards any signatory ratifying subsequently, the convention shall come into force at the date of the deposit of its instrument of ratification.

7.4 The contracting parties shall not have a right to reserve any provisions of this convention.

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<sup>310</sup> CSCE, *Helsinki Summit Decisions* (1992) 35 ILM 1385.

<sup>311</sup> CJ Dias, 'Toward International Human Rights Crimes: An Asian Perspective on Human Rights and International Criminal Law' in D Shelton (ed), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational, New York 2000) 40.

7.5 The Secretary General shall notify all the members of the SAARC of the entry into force of the convention, the names of the contracting parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Commentary: Treaties create legal relations between the states by means of their agreement. Precisely, this is the reason why protection of sacred sites in South Asia is proposed in the form of a convention, a multilateral treaty, which creates binding obligations among its members and the regional court which enforces the rights granted in the model convention.

In any treaty, the consent of the concerned state is required through a specific process. Article 11 of the 1969 Vienna Convention on the Law of Treaties describes that the consent may be given in various forms. However, two important methods are consent by signature and consent by ratification<sup>312</sup> which expresses a state's consent to be bound by the treaty provisions.<sup>313</sup> Basically treaties will become operative as soon as consent to be bound by the treaty has been established by all the negotiating states, in the absence of any other provision.<sup>314</sup> The model convention offers both methods to states to express their consent. Article 7.2 states that 'the convention shall come into force after the deposit of five instruments of ratification'. In the SAARC organisation, there are eight<sup>315</sup> member states and bilateral relations between India and Pakistan are only improving in the recent years. At this given situation, it may not be feasible to get the consent of all the states in the region which could invalidate the entire process. Hence the consensus policy may not be applied here, rather, ratification of five states will set the treaty into motion.

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<sup>312</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1154 UNTS 331 (VCLT) art 2(1)b states that 'the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty'.

<sup>313</sup> Vienna Convention (n 298) art 14.

<sup>314</sup> Vienna Convention (n 298) Art 24.

<sup>315</sup> Afghanistan became a member of SAARC in 2007. See n 89, below.

Article 7.2 of the model convention illustrates that the provisions of this convention shall not allow the contracting parties to make any reservations.<sup>316</sup> This ability of a state to make reservations to an international or regional treaty is based on the principle of sovereignty of states. However, in the model convention the right to make a reservation of a treaty provision is removed since the convention deals with a particular right called 'right to protection of sacred sites'. Other rights are subsidiary in nature to protect this only right and hence it has been considered unnecessary to make reservations while ratifying it.

## 5.7. Concluding Observations

The first section of this chapter examined the benefits and weaknesses of the existing three major regional organisations, namely the European, the Inter-American and the African. The second section analysed the characteristics of South Asia with a special emphasis on how religious disputes damage its regional peace and security. Section three examined different theories of establishing a human rights regime and this will be used to create a new regional convention in the South Asian region. The fourth section evaluated the merits of the existing regional organisation, the South Asian Association for Regional Cooperation (SAARC), in promoting peace and stability in the South Asian region. It particularly considered the possibility of using the SAARC as a facilitator from which a regional convention to protect sacred sites to enhance the promotion and protection of freedom of religion, may be brought forth. The fifth section developed a draft model for the proposed regional convention for protection of sacred sites with a commentary to justify the articles proposed in the model convention.

The model convention for protection of sacred sites in the South Asian region is essential to protect the rights of citizens, particularly because of the growth of religious militancy and exploitation of sacred site disputes for political gains. Such disputes not only disrupt internal peace but also bring discord among the nations; democratic values are trampled upon and innocent lives are constantly under threat in the region. Economic growth, both

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<sup>316</sup> Vienna Convention (n 298) art 14 defines 'Reservation' as 'a unilateral statement, ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

within and beyond the region stagnates. Trade links and cultural exchange among the countries are strained. Communal riots and violence divide the society vertically and horizontally leading to violations of human rights. Prolonged religious conflicts polarise the civil society and the space for NGOs and human rights activists will fade away. Hence, for promoting and protecting human rights and for establishing an authentic democratic civil society in the region, the adoption of this model convention is important.

## **CHAPTER VI**

### **CONCLUSION**

The key argument and main findings of the research on the disputed sacred sites and international law are summarised in this concluding chapter. The need for ensuring the protection of the sacred sites in the South Asian region, as illustrated from the case study on Ayodhya, emphasises the urgency for adopting the proposed model convention.

#### **6.1. Key arguments**

Sacred sites are significant to the right to freedom of religion. Any religious community, including minorities, who have organised themselves on the basis of their religion, have sacred sites that have tended to become their identity icons. Yet, the ever increasing attacks on sacred sites by states as well as non-state actors pose a serious risk to these rights.

The rights of religious communities who generally own and have placed their faith in the sites as sacred symbols are at stake due to attacks. The consequences of such attacks are obvious from the case study on the Ayodhya dispute, and protecting the sacred sites from attacks is an important component of freedom of religion. The inadequacy of the existing legal mechanisms in a particular state warrants intervention from the international community and global human rights instruments. This is especially so because attacks on sacred sites today cannot but be seen as infringement on the right to freedom of religion and there is a need to develop it to include protection of sacred sites.

#### **6.2. Research questions**

The first question centred on the role of sacred sites in pluralistic India, while the second focused on the dispute at Ayodhya, and its relevance to Indian polity. Thirdly, the adequacy of the courts and existing legislations provided by the Indian legal system was examined. A further question centred round the relevance of international laws in settling regional issues, particularly as pertaining to human rights. Finally, the possibility of formulating a regional

convention potent enough to settle sacred sites disputes, not just in the South Asian region, but in any other region was discussed.

### **6.3. Main findings**

The Ayodhya dispute began by the illegal installation of the idols of Hindu deities Ram and Sita inside the Babri Masjid in 1950. Subsequently the legal proceeding started to establish the right of the property between a few members of the Hindu religious community and the Muslim community. After a long legal battle, the militant communal groups from the Hindu religious community destroyed the mosque in 1992. Because the dispute has been allowed to fester since 1950, it has led to divisive entrenched positions on the part of the Hindu and Muslim religious communities leading to a negative mindset in which neither community is willing to accept a decision against them. In turn, these entrenched positions taken by these religious communities have eroded secular and democratic principles guaranteed by the Indian constitution, with the effect that these communities now voice their concerns couched in religious terms. Now the dispute is not seen as a legal dispute per se, but as a politico-religious dispute affecting the body politic of India.

After the Ayodhya dispute, there has been a tendency by the Hindu Nationalist political parties such as BJP and Shiv Sena to base their political campaign on the religious sentiments of their communities. Especially from the 1990s onwards these political manoeuvrings surrounding the Ayodhya dispute have led to their enhancing vote share and being elected to power in various states and at the national level. Hence a fair and neutral resolution on this dispute is unlikely in the near future.

Since this dispute has divided Indian society vertically along religious lines, any judgement will be seen as an injustice to the other community, very likely resulting in more and more religious riots. This may lead to egregious human rights abuses of members belonging to these religious communities, particularly minority religious communities. Moreover, a judgement if rendered in favour of the majority community, will serve as a precedent for the Hindu militants to justify their claims that more than three thousand sacred sites belonging to minority communities belong to them. Therefore, there is a greater likelihood

that the nation will plunge into a spiral of communal violence causing more human rights violations. Consequently, a fair legal settlement might be unfeasible in the existing situation.

The second question is answered by the evidence delineated in the case study. It suggests that the three organs of the Indian state, the legislative, judiciary and the executive, had failed to protect the Babri Masjid from illegal demolition and to prevent the subsequent nationwide human rights abuses. The Ayodhya dispute has undermined the established secular values in the country, and has created apprehension among minority religious communities. The subsequent growth of the BJP, a Hindu nationalist party, has threatened the secular nature of India and minority religious communities and their sacred sites were freely attacked by members of the *Sangh Parivar*.<sup>1</sup>

Moreover, the federal nature of India was challenged by the state government of UP not adhering to the instructions of the union government. By allowing the demolition to take place, the state government abdicated from its duty to protect the rights of its citizens. As a secular government, it has a responsibility to put law before faith in protecting the rights of its citizens. In the Ayodhya dispute, the government gave priority to its religious faith ignoring the faith of minority communities and thus undermined the law. This research recommends that to maintain the secular, democratic, social fabric of India, state organs should give priority to constitution and treat all religions equally in protecting their rights.

The third question queried the inadequacy of the courts in settling this dispute. Though the role of an independent judiciary is vital in settling the dispute and providing remedy to a minority community, the lacklustre attitude of the courts has proved inadequate to protect the sacred site and protect the victims from subsequent riots and violence. The suits which began in 1950 could not get a final verdict until 1992 when the mosque was demolished. All these years, the courts requested the parties to maintain the 'status quo' thereby ignoring the rights of the minorities in favour of the established religious community. Subsequent to the demolition, the members belonging to the *Sangh Parivar* organisations

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<sup>1</sup> Text to n 83 in chapter 3.



hastily built a temporary temple and kept the idols there. Though the courts are aware that legally this is not maintainable, they asked to maintain 'status quo' which is a clear violation of constitutional provisions.<sup>2</sup>

After the demolition, the courts have not been able to punish those who were involved in the demolition of the mosque and subsequent riots which claimed thousands of lives.<sup>3</sup> The delay in bringing those to justice is seen as example of the courts inadequacy in handling disputes such as Ayodhya. This delay can be attributed to the political process existing in the country. In 1986, the court allowed the opening of the locks of the Babri mosque to the Hindus, which was possible only because of the tacit support of the congress government.<sup>4</sup> Although Indian Constitution empowers the courts with enough provisions, the case study points out that the courts failed to act impartially and used delay tactics to postpone the dispute culminating in the demolition of the Babri mosque. This research proposes that the judiciary need to remain independent and impartial in providing speedy justice to the victims of human rights which is lacking deeply in the Ayodhya dispute.

The failure of the domestic legal system leads to the fourth question which is concerned with the international human rights law. International law provides a way to redress obvious human rights violations when domestic organs fail. There is a necessity, therefore, to develop international law to include protection of the sacred sites as it is a significant component of freedom of religion. But given its nature, international human rights law offers only a supervisory framework for the promotion and protection of human rights. However, the member states are obliged to protect, fulfil, and promote human rights within their jurisdiction.

Protection of sacred sites could be covered under four different rights recognised in international law. They include the right to freedom of religion, rights of the minorities, right to property and protection of cultural rights during armed conflict. The existing international law provisions, however, have not included protection of sacred sites as a

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<sup>2</sup> Text to n 167 in chapter 3.

<sup>3</sup> Text to n 329 in chapter 3.

<sup>4</sup> Text to n 121 in chapter 3.

right to a religious community. An analysis of these rights reveals that international human rights law is mainly concerned with individual rights and except for a few rights, such as prohibition of genocide, they do not protect collective rights of groups.<sup>5</sup> Since protection of sacred sites falls on collective rights of a religious community, they do not appear, apparently, on any of these international law instruments. Moreover, since sacred sites and their protection are not recognised as a right, the existing provisions of international law and their enforcement mechanisms do not offer any remedy to sacred sites disputes similar to that at Ayodhya. This necessitates developing provisions in the existing international law to include protection of sacred sites, as developing right to freedom of religion is a contribution of this research.

Regional organisations have promoted human rights protection in their region through human rights mechanisms such as human rights commissions and regional human rights courts which have complaints mechanisms which allow not only for states but also individuals and non-governmental organisations. The European region has by far the most advanced system compared to the inter-American and African regional systems. Although there is a need to improve their performances in protecting human rights in their region, they are more useful and practical than global human rights instruments.<sup>6</sup> There is no regional human rights system existing in the South-Asian region which could be used to redress disputes similar to Ayodhya.

This leads to the fifth question which is concerned with drafting a model convention for the protection of sacred sites in South Asia. The facts provided in the fifth chapter support that a model convention thus becomes necessary. Internal security and peace, stability and human rights in this region today are primarily threatened by the resurgence of religious militancy among the South Asian states.<sup>7</sup> The focus of the militant religious groups is often on sacred sites belonging to other religious communities. It has been established in the Ayodhya dispute that attacks on sacred sites result in human rights violations and threaten peace in the region. When the rights of the minorities are violated, civil society is

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<sup>5</sup> Text to n 153 in chapter 4.

<sup>6</sup> Text to n 11-16 in chapter 5.

<sup>7</sup> Text to n 99-105 in chapter 5.

weakened. Secular voices in these countries are slowly losing faith in the law enforcement machinery, particularly in the judiciary. These reasons necessitate the member states of SAARC to adopt a human rights treaty to protect the sacred sites.

#### **6.4. Draft model for the South Asian Regional Convention for the Protection of Sacred Sites**

The proposed model is the first attempt to draft a specialist treaty to protect sacred sites in the South Asian region, as a significant component of the right to freedom of religion. Moreover, the draft model guarantees the collective right of religious communities to establish, maintain, administer and use sacred sites as a fundamental right, however, without affecting the rights of other religious communities. The recognition of collective rights of religious communities will be a development in international human rights law which is mainly concerned with a few exceptions, individual human rights. Once again, this is the first draft treaty which supports the right to undertake pilgrimage for the adherents of any religion. As the rights of the indigenous people gain momentum, this draft model proposes to protect their rights, specifically, to use their sacred sites without unjust interference from a state or non-state actors.

The enforcement mechanisms proposed in Article 6 of the draft Model Convention is the first of its kind to address the issues of religious communities. Appointing a High Commissioner will be a major step in bringing awareness among the people of this region and serves as a useful mechanism to avert major human rights abuses based on religious disputes by giving early warning to the member states. The proposed human rights court will function as a precursor to a future regional court based on a South Asian Convention for human rights.

The draft model convention, if adopted by the SAARC members, could have long-term consequences for establishing peace and security in the South Asian region. This will also assist in strengthening the civil society in the region which is sine qua non to cope with the growing religious militancy in various states in the region. The model convention if adopted and applied in the right spirit will restrain many disputes in the initial stage and

states will be able to protect their citizens embroiled in riots and violence. Above all, it will promote and protect human rights in the region which is vital for the development of the whole Asian region. Eventually, it will also lead to adopt a full-fledged human rights treaty for South Asia similar to the European Convention on Human Rights.

### **6.5. Recommendations for further research**

The Babri Masjid-Ram Janmabhumi, a sacred site, studied primarily from the legal perspective, exposed the inadequacy of the courts in a particular state to remedy a long-drawn-out row. However, there still are a number of other causes and compulsions such as population and caste affiliations which curtail the independence of the judiciary. Partiality prevalent in the lower level of the judiciary and the impact of local traditions, including religious affiliations, need further study.

Qualitative data and analysis are needed to understand the rise of militant religious groups in the region. A holistic approach is vital to tackle growing religious militancy. It cannot just be confined to the judiciary. No legal instrument can be effective unless the economic issues of the people of this region are tackled. Therefore, for the legal provisions to take hold, further study on the nexus between religious militants and members of the judiciary in South Asia seems inevitable.

Countless numbers of sacred sites exist in the South Asian region alone. From the road-side tiny shrines to temples, mosques and churches of historical importance abound in this region. It is indeed a Himalayan task to separate the sacred sites from the ordinary or the less important sites. It is even more cumbersome for any state administration to provide protection to all such sites. Hence, further study seems vital to suggest ways and means of regularising the sacred sites without discrimination to a particular religious community.

There is also a need to further research to examine how this proposed model convention could be adopted and implemented in South Asian region.

## APPENDIX 1: LIST OF INTERVIEWEES

The interviews took place during my first trip to India from 1 December 2005 to 28 February 2006.

1. Arul Raj, Retired Judge, Civil Court at Chennai (Chennai 20 February 2006).
2. C. K. Mishra, Correspondent *Jan Morcha* (Lucknow 10 February 2006).
3. Dr. Asghar Ali Engineer, Director of Institute of Islamic Studies and Centre for Study of Society and Secularism (Mumbai 6 December 2005).
4. Dr. Balu, Head of the Department for Legal Studies, University of Madras, (Chennai 20 February 2006).
5. Dr. Devasahayam, Chairman of People's Watch – Human Rights Organisation, India (Madurai 20 February 2006).
6. Dr. John Dayal, President-All India Catholic Union, Secretary General-All India Christian Council, Member of National Integration Council (New Delhi 29 January 2006).
7. Dr. Nithya, CBCI National Secretary to Justice and Peace Commission (New Delhi 5 January 2006)
8. Dr. Raju, Advocate, Supreme Court of India (New Delhi 8 January 2006).
9. Hon. Sitaram Yechury, Member of Parliament, Communist (Marxist) Party of India (New Delhi 22 January 2006).
10. I.B. Singh, Advocate Lucknow High Court, Advocate to Justice Liberhan Commission, (Lucknow 9 February 2006).
11. Khaliq Ahmed Khan, Chairman of 'Ayodhya Faizabad Study & Research Centre' Faizabad (Faizabad 10 February 2006)
12. N. Ram, Editor-in-Chief, *The Hindu* (Chennai 18 February 2006).
13. N. Ravi, President of Editors Guild, New Delhi (Chennai 18 February 2006).
14. Prof. Muhammad Iqbal, Principal of Ambedkar Law College, India (Tirunelveli, India 17 February 2006).
15. Ram Puniyani, Member of EKTA, Committee for Communal Amity (Mumbai 8 December 2005).

16. Sharma, Inspector General of Central Bureau of Investigation (New Delhi on 28 January 2006).
17. Telephonic interview with A.G. Noorani, Advocate, Supreme Court of India and a leading Constitutional expert (Mumbai 8 December 2005).
18. V.V. Augustine, Member of National Minority Commission, Govt of India (New Delhi 6 January 2006).
19. Vincent Chinnadurai, Chairman of Minority Commission, Tamil Nadu (Chennai 18 February 2006).
20. Zafaryab Gilani, Convener of the All India Babri Masjid Action Committee and Advocate, Lucknow High court (Lucknow 14 February 2006).

## **APPENDIX 2: SECOND FIELD WORK TRIP**

### **Second field work trip in India from 1 - 21 July 2007**

During this field work trip, group meetings were arranged to conduct in-depth discussions at five places in Tamil Nadu, the home state of the researcher. Scholars, human rights activists, lawyers and research students were included, for wider consultation. The outcome of the discussions was integrated into the main findings of the thesis, especially in chapters 3 and 5. Preliminary findings were circulated amongst participants, and at the time of the meeting, the scholar gave a brief presentation of the objectives and findings of the research. The participants then raised their questions, and gave their opinions and suggestions based upon their personal reading of the material circulated and also from the presentation. This was proved to be very useful, methodologically. The participants, venue and dates of the meetings are given below.

The first group: venue - Chennai

Date - 4 and 5 July 2007

Participants: Dr Robin, Registrar of Ambedkar Law University, Chennai,

Dr Devadoss, Professor at Ambedkar Law University, Chennai,

Dr Joe Arun (Oxon), Lecturer, Loyola College, Chennai and

Dr Patrick, Lecturer, University of Madras, Chennai.

The second group: venue - Trichy

Date - 7 and 8 July 2007.

Participants: Dr V Maria Alphonse,

Dr D Alphonse, Rector of St Paul's Seminary, Trichy,

Rev Packianathan, Research scholar in Oxford,

Mrs Banumathi MA, LLM, human rights lawyer,

Dr A Marx, human rights activist and writer, and

Dr XD Selvaraj, human rights activist, Bangalore.

**Third group: venue - Madurai**

**Date - 11 and 12 July 2007**

**Participants: Dr Devasahayam, President of People's Watch – a human rights organisation, Mr Karunanidhi, advocate and member of People's Watch, Dr Xavier, Vice-Principal of De Britto College, Madurai, Dr Socrates, Professor, Madurai Kamaraj University and a human rights activist and Dr.Immanuel, Rector of Pillar House and human rights activist.**

**Fourth group: venue - Palayamkottai**

**Dated - 14 July 2007**

**Participants: Dr Britto, Director of Vaanmuhil – a human rights organisation, Mr Muhammad Iqbal MA, LLM, Principal of the Government Law College, Tirunelveli, Mr Varghese MA, LLM, Professor at Government Law College, Coimabatore and Dr Aruldoss, Director, Sivagangai Multi Purpose Society, Tamilnadu.**

**Fifth group: venue - Nagercoil**

**Date - 15 and 16 July 2007**

**Participants: Dr Maria Alphonse,**

**Dr William,**

**Dr Wilson,**

**Dr Hilarius,**

**Rev Amirtharaj, Director, St Xavier's Engineering College, Nagercoil.**

The participants are mainly human rights activists involved in building up a strong civil society in the southern part of India. All five venues are situated in the state of Tamilnadu, India. The group discussions further substantiated the need for promotion and protection of human rights in South Asia as well as addressing the protection of sacred sites in a regional convention. The researcher expresses his gratitude to these participants for taking part in this research.



### **APPENDIX 3: DRAFT MODEL FOR REGIONAL CONVENTION**

#### **Text of draft model for regional convention for protection of sacred sites**

##### **Preamble**

Recalling that one of the basic principles of the Charter of the United Nations is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recalling that one of the basic principles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights is that every person has the right to freedom of thought, conscience and religion, and freedom, either alone or in community with others, and in public or private to manifest one's religion in teaching, practice, worship and observance,

Considering that freedom of religion, in many countries, is infringed by attacking sacred sites belonging to particular religious communities leading to egregious human rights violations within states, and exacerbates tension and violence in other states where the members of the same religious communities live or settled,

Convinced that disputes over sacred sites and attacks on them destabilize peace and security in the region and it is essential to promote understanding, tolerance, and respect in matters relating to freedom of religion to foster international and regional cooperation among states,

Concerned by the existence of discrimination in the granting of permission to establish, maintain, and fully use for religious purposes, and the inadequate protection given to sacred sites belonging to minority religious communities,

Considering that the aim of the regional organisation SAARC is promoting peace, stability, amity and progress and such an aim has to be pursued in the maintenance and further realization of human rights and fundamental freedoms,

Convinced that it is essential to give particular attention to the protection of sacred sites as part of the protection and promotion of rights of freedom of religion and also rights of minority religious communities which cannot be disassociated from maintaining peace and stability in the South Asian region,

Resolve hereby that all contracting parties adopt all necessary measures for the protection of sacred sites to protect and promote human rights and freedoms, in particular the right to freedom of religion within their jurisdiction,

Now, therefore the member states of the SAARC proclaim this regional convention on the protection of sacred sites in South Asia:

**Article 1 - Right to sacred sites is a fundamental component of the right to freedom of religion**

1.1. Every religious group shall have a right to establish sacred sites and to manifest therein their faith through worship, observance, practice and teaching.

1.2 Every religious individual and group shall have the right to undertake pilgrimage to sacred sites both within and outside one's country.

1.3 Indigenous peoples living within the South Asian region shall have the right to their sacred sites, ceremonial objects and the remains of their ancestors. States shall undertake special measures and assist indigenous peoples to preserve and protect their sacred sites.

**Article 2 - Protection of sacred sites is a right of religious groups**

2.1 Every religious group has the right to acquire and own property and to own and administer such property in accordance with law.

2.2 Every religious group has the right to establish, maintain, administer and to make full use of its sacred sites.

2.3 Every religious organisation shall have the right to register their sacred sites and shall have the independence to create their own organizational rules and internal by-laws, compatible with domestic legislation.

2.4 Every sacred site shall attain legal personality upon its registration by the religious organisations in the corresponding public registry created for this by the government.

2.5 Registration shall be granted to the religious organisation by virtue of an application together with an authentic document containing proof of title to the land or property involved.

2.6 The application for registration shall contain proof of the foundation or establishment of the organization, declaration of religious purpose, denomination and other particulars of identity, rules of procedure, names of representative bodies and the powers of such bodies.

2.7 There shall not be any discrimination in granting registration to any religious groups.

2.8 Registration shall only be cancelled by a commission appointed by the state or compliance of a final court verdict or at the request of its representative body.

2.9 Registered sacred sites shall be entitled to voluntary financial and other contributions from individuals and institutions within the state and from abroad.

2.10 Registered sacred sites shall be protected against unlawful demolition, re-location or compulsory acquisition.

### **Article 3 - Right to equal treatment of all sacred sites**

3.1 Every religious group shall have the right to equal treatment to establish, maintain and administer sacred sites without any discrimination.

3.2 For the purpose of the present convention, the expression 'discrimination' shall refer to any unreasonable distinction, exclusion, restriction, imposition of condition, and abolition of the recognition, enjoyment or exercise of the freedom of religion.

3.3 There shall not be any arbitrary interference with respect to the right of religious groups to establish, preserve and protect sacred sites from any state or non-state actors, group of persons or individuals on the ground of religion.

## **Article 4 - Legal limitations in protecting sacred sites**

**4.1 The right to establish, maintain and administer sacred sites may be subject only to such limitations prescribed by law and/or are necessary to protect public order, health, morals and the fundamental rights and freedoms of others.**

**4.2 The right of religious groups to establish, maintain and administer sacred sites shall be subjected to state restrictions necessary on the grounds of planning requirements and registration policies, and regulatory provisions. However, such policies and regulations shall be formulated and implemented with due respect to preserve and to allow coexistence of all sacred sites without any discrimination.**

## **Article 5 – Remedies**

**5.1 All decisions by the state on demolition, re-location or denial of planning permission shall be guided by the principles of transparency, fairness and impartiality. The decisions shall be subject to judicial supervision.**

**5.2 Defilement, destruction or damage to sacred sites shall be treated as a criminal offence, a cultural crime against humanity, and any individual who commits such an offence shall be punished in accordance with the domestic law of the state where the offence was committed.**

**5.3 Any individual or public official who aids and abets the above offences shall be punished in accordance with the domestic law of the state where the offence was committed.**

**5.4 When a state fails to punish those individuals or groups involved in attacks over sacred sites, they shall be subjected to regional court when such acts lead to egregious violations of human rights.**

**5.5 Sacred sites illegally damaged or destroyed shall be repaired or rebuilt at the same site or at a suitable alternative site at the expense of the individuals or groups responsible for such crime, but if circumstances arise where this is not feasible, the state authorities shall be responsible in rebuilding those sacred sites especially when the state fails in its obligation to protect these sites.**

## **Article 6 - Enforcement mechanisms**

### **National level:**

6.1 Every state, party to the present convention undertakes to respect and to ensure the right to protection of sacred sites to all individuals and to all religious groups within its territory through appropriate means including legislation and administrative measures.

6.2 There shall be a commission in every participant state and membership shall include an equal number of members of government officials and representatives of religious communities in the country.

6.3 The functions of the commission shall include making proposals to the government to implement the provisions of the convention, reporting of all events in the state, reviewing situations, and trying reconciliatory measures among various disputing religious or other groups.

### **Regional level:**

6.4 To ensure the observance of the activities undertaken by the contracting parties to the convention, there shall be a permanent regional court in the South Asian region.

6.5 The Court shall have jurisdiction concerning interpretation and application of the convention in protecting sacred sites.

6.6 Any contracting party may refer to the court any alleged breach of the provisions of the convention by another contracting party.

6.7 The court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the contracting parties of the rights set forth in the convention.

6.8 The SAARC shall appoint a High Commissioner for the protection of sacred sites to identify and seek early resolution of religious disputes that might endanger peace, stability or friendly relations between SAARC participating states.

## **Article 7 - Ratification of the convention**

**7.1 This convention shall be open to the signature of the members of the SAARC and shall be ratified. Ratifications shall be deposited with the Secretary General of the SAARC.**

**7.2 The present convention shall come into force after the deposit of five instruments of ratification.**

**7.3 As regards any signatory ratifying subsequently, the convention shall come into force at the date of the deposit of its instrument of ratification.**

**7.4 The contracting parties shall not have a right to reserve any provisions of this convention.**

**7.5 The Secretary General shall notify all the members of the SAARC of the entry into force of the convention, the names of the contracting parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.**

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